To-

Mr Charles H. Hands

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THE CONSTITUTION

OF THE

GERMAN REPUBLIC.

BY

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PREFACE

The publication of a work on the German Constitution at a moment when German public law seems once again to be in the melting-pot, must at first sight appear a particularly ill-timed undertaking. And the reader who can be induced to open this book at all, would have grounds for anticipating that he would be treated in its pages to an epilogue of the drama the first act of which was played at Weimar in 1919. The author refrains from pleading in bar of an adverse judgment the fact that the studies of which the present treatise is the fruit, were embarked upon more than a year ago, *i.e.*, at a time when no one could have foreseen what havoc force applied from without to the nerve-centre of German economic life would work with the body and soul of the German nation. Such an argument would justify the composition of the book, but hardly its appearance in print. The grounds on which he has decided to publish it are of a different order.

It is true the constitutional guarantees are suspended in Germany, and the country is said to be under the rule of a dictator, or more correctly speaking, of two dictators. And as if this were not enough, an

Emergency Powers Bill is now before the Reichstag, by which it is sought to exempt wide fields of governmental activities from parliamentary control. But does this really signify the demise of the Constitution? By no means; it is not even in a state of suspended animation. An exceptional situation demands exceptional measures, but all steps hitherto taken to meet it have strictly conformed to the prescriptions of the Weimar text. In proclaiming a state of siege, the President of the Federation has merely exercised the powers conferred on him in Article 48, and if both he and the Reichstag have wisely refrained from vetoing the high-handed measures independently taken by Bavaria, the political motive was undoubtedly the determination to avoid a conflict, in these critical days, between the Federation and the second largest state, but the exercise of that forbearance has prevented the Bavarian revolt from being, technically at any rate, a breach of the Constitution. Again, nobody questions that the bill referred to, in order to become law, must be passed with the majorities required for amendments of the Constitution, and the threat of the government to advise a dissolution if it is not carried, is but an announcement of its intention to use its recognised constitutional power to appeal from the elected to the electors. If all these revolutionary steps are being taken within the four corners of the Constitution, the merit belongs to the Reichstag, and the tenacity with which this body clings to constitutional forms in circumstances of exceptional difficulty, seems to justify to a certain extent the hope that the work of Weimar may weather the storm, may

survive as a living reality, and may yet have the chance, which heretofore it has never had, to show whether, and to what extent, it is adequate to regulate under normal conditions the public life of new democratic Germany.

But if the Reichstag has once again proved the bulwark of the Constitution, it cannot be denied that the German people as a whole has lost practically all interest in the forms in which it is governed. The country has been reduced to such dire economic straits that the struggle for the prime necessaries completely fills the mental horizon of the masses, and a people which has never yet learnt to govern itself, will in such circumstances be all the readier for any change that seems to hold out prospects, real or imaginary, of better conditions of life. The soil is thus prepared for a political upheaval, and he would be a rash man who dared to answer the question, *Quo vadis, Germania?* Events are moving fast, and the possibility has therefore seriously to be reckoned with that the Weimar Constitution will be completely upset before long. But even if this contingency should arise, the German Constitution of 11th August, 1919, would remain a document of great historical and political interest—historical, as embodying the courageous attempt of a brave people that had just fallen from its high estate, "to renew and establish its commonwealth on the solid bases of liberty and justice," as an instrument, moreover, characterised by a moderation probably unique on the morrow of a revolution, of a revolution too, social no less than

political, and as a charter inspired by those high Wilsonian ideals which, by a strange irony of fate, seem to have been taken seriously in Germany alone—political, because the builders at Weimar incorporated in their design certain novel ideas, some of which were indeed foredoomed to failure from their very inception, whilst others may yet bear fruit, if transplanted to a more favourable political soil.

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THE CONSTITUTION OF THE GERMAN REPUBLIC.

CHAPTER I.

THE GENERAL FEATURES OF THE CONSTITUTION

Closely following upon the collapse of the German armies in the field, the German revolution broke out early in November, 1918. The last of the Hohenzollerns abdicated on the ninth of that month, the rest of the German princes either followed his example or were driven from their thrones, and on the same day the German Federation was proclaimed a republic. The empire, as founded by the Bismarckian constitution of 16th April, 1871, had come to an end, and with it disappeared the organs of government established by it. The revolution having been the work of the proletariate, a Soviet régime after the Russian pattern was set up in the first instance. Supreme power passed to a Council of Commissioners of the People, which derived its authority from innumerable local councils of workmen and soldiers and published a political programme, according to which the realisation of the socialistic ideal was to be the main task of the revolutionary government. But serious divergences of opinion as to the forms in which the German republic was to be permanently organised, and as to the authority by which the new constitution was to be framed, soon became manifest between the two wings of the social-democratic party. The minority or independent socialists wished to perpetuate the dictatorship of the proletariate and

to confer constitutive powers on a Central Council of Workmen and Soldiers, composed exclusively of delegates of the local councils. The majority socialists, on the other hand, wanted to remain faithful to their democratic, no less than to their socialistic, principles and insisted that the settlement of the constitution must be entrusted to a National Assembly, elected on the broadest democratic basis and representative of all classes of the community. A National Congress of Workmen's and Soldiers' Councils adopted the latter standpoint by an overwhelming majority. A general election, the details of which were regulated by an ordinance of the commissioners of the people on the principle of universal suffrage, was accordingly held on 19th January, 1919, and the German National Constituent Assembly was summoned to meet at Weimar on 6th February. Having first passed an act on the provisional exercise of the federal powers, it entered immediately upon its main task.

Meanwhile, Professor Hugo Preuss, previously Secretary of State, now Federal Home Secretary, had prepared, at the request of the commissioners of the people, a draft-constitution, which was published immediately after the general election. Two of its chief aims, the extreme concentration of government power in the federation at the expense of the states and the planned dismemberment of Prussia, had excited vehement opposition in South Germany no less than in Prussia. The federal government was compelled to convene and call into consultation a Committee of States, to which the larger states sent two delegates each, the smaller states one. As the result of their deliberations the original draft was modified in many important directions and so transformed into what is known as the second or government draft, which was submitted to the National Assembly, there read a first time and then referred to a Committee on the Constitution of twenty-eight members, on which the political parties were represented in proportion to their numerical strength in the main body. It took this committee more than three months to complete its labours.

The constitution which it finally reported to the house, and which may be described as a compromise between the Prussian and the government drafts, was adopted by the National Assembly, subject to many, but merely minor, amendments, and came into force on 14th August, 1919. Two facts deserve attention in this connection, viz.:—

(1) In the words of the Preamble, "this constitution has been framed by the German people, at one (or, as one) in its tribes," *i.e.*, the constitution is the work of the nation as an undivided whole. It has been enacted by the National Assembly, a national organ elected on a national basis, and it became the fundamental law of the federation without previous ratification by, or the formal consent of, the states.

(2) The German people did not, as the Preamble might be thought to suggest, take any direct share in the framing of the constitution. The concluding article corrects any such erroneous impression. It runs: "The German people, through its National Assembly, has framed and enacted this present constitution." In other words, the National Assembly has been clothed with full constitutive powers by the sovereign German people, and the constitution has never been submitted to the popular vote.

The German constitution, as elaborated in Weimar, is full of shortcomings and defects. Not even its ground-plan can stand the searchlight of criticism. Political inexperience is writ large on every page of the text; and, to mention but a few more of its cardinal faults, it contains intrinsic evidence that its framers could not emancipate themselves from ideas and sentiments associated with a past *régime*, when dealing with an entirely new situation; that they went to extremes in their attempts to reconcile conflicting tendencies, with the result that many of the provisions are either futile and meaningless on the face of them or incapable of realisation; that they too often promise a good deal which the means at the disposal of the federation are, and will for generations prove,

inadequate to perform, so that an atmosphere of unreality is introduced into the constitution; and, finally, that they frequently cling to formal technicalities where breadth of treatment seems most needed, and on many occasions seem altogether to prefer the letter to the spirit. Yet even if their sins were a hundredfold blacker, they would be adjudged worthy of the greatest admiration and praise if the historical background is remembered against which they worked—a picture *oscuro senza chiaro,* made up of defeat and humiliation, disappointment, starvation, revolution, and, on the top of it all, the despair generated by a peace-treaty impossible of fulfilment. The constitution proves that they made an honest attempt to carry out the desire of the German people, as expressed in the Preamble, "to renew and to establish its Federation on the solid bases of liberty and justice, to serve the cause of peace within and without, and to promote social progress." Nay, more than that; in the midst of a raging sea of political passions which threatened to devour every national conquest of the past, the National Assembly displayed a degree of moderation and self-restraint all the more wonderful since it was composed, in almost equal proportions, of socialistic and bourgeois elements. But its members were well aware that the very life of the nation lay in their hands, and they may justly claim that by the fruit of their labours they have saved the national cause and preserved the federation from utter disruption.

The constitution consists of two principal parts. The second, which deals at great length with fundamental rights and duties, will be reserved for separate treatment at the end of this book and otherwise only occasionally referred to. The first, which is entitled "Structure and Tasks of the Federation," regulates in seven sections—

(1) the distribution of powers between the federation and the states and their general relations to one another: section I.;

(2) the organisation of government, in three sections, viz.:—

(a) the Reichstag (Federal Parliament): section II.,

(b) the President of the Federation and the Federal Government: section III.,

(c) the Reichsrat (Federal Council): section IV.;

(3) the exercise of the main functions of government, in the three concluding sections of the first principal part, viz.:—

(a) Federal Legislation: section V.,

(b) Federal Administration: section VI.,

(c) Administration of Justice: section VII.

The arrangement of topics has obviously been suggested by reminiscences of the theory of the separation of powers, but the latter has only supplied the principle of classification and not in any way influenced the working of the German constitution. Indeed, in one instance at least it appears that logical order has been sacrificed for the sake of formal symmetry. Section VI., entitled "Federal Administration," does not lay down general principles for the exercise of executive power, but enumerates the branches of administration withdrawn from the states and reserved to the federation, together with a mass of detailed provisions of no constitutional importance whatever. Its proper place would therefore appear to be in section I., in connection with which it will be treated in this book. Even the boundary line between the two principal parts is not sharply drawn. To give but one example, the Federal Economic Council, an additional, though subsidiary, federal organ, is dealt with in the chapter devoted to fundamental rights and duties in the economic sphere.

Before the main characteristics of the constitution are discussed, a few preliminary questions must be disposed of, which have greatly worried German commentators. In the first place, it has been asked whether the German constitution really deserves that name. From the clause in Article 178, that "the provisions of the treaty of peace signed at Versailles on the 28th June, 1919, are not affected by this constitution," it has been seriously argued that, since the articles of the treaty have a validity superior to those of the constitution, the fundamental law of the German federation has to be looked for, in

the first instance, in that instrument, much as the constitution of a British dominion is to be found in a statute of the imperial parliament, the work of the National Assembly being that of a subordinate law-making body. In other words, the problem has been raised whether under the peace treaty the German federation is still a sovereign state. Attention has been drawn in particular to Articles 331-362 of the treaty, by which the larger German rivers are all placed under the control of international boards, on which the German federation has not a single representative—to Articles 159-213, which leave it no longer free to provide for its defence—and to Articles 264 *seq.*, which prevent it from having an independent customs policy—in order to show that the answer is, at the very least, doubtful. It seems an inadequate answer to these objections to say that the provisions of the constitution, in so far as they conflict with the treaty of peace, are not therefore void, but are merely suspended in their operation as long as the treaty is in force. The treaty was signed by Germany and ratified by a federal law. A treaty, as every form of agreement, implies consent, and in the sphere of international law consent is not vitiated by duress. That is to say, the limitations on the exercise of her powers are self-imposed, and do not therefore derogate from her sovereignty. It is then by an act of her own will that the articles of the constitution which conflict with the treaty of peace are inoperative, but the treaty is not thereby made part of her fundamental law. If this reply has a somewhat sophisticated ring about it, the fault lies in the fictions of international law which fail to do justice to the hard facts of political reality.

Another hotly contested point is the relationship which the German federal republic bears to the German empire. It has been maintained, both on legal and on historical grounds, that the empire perished at the revolution, and that the republic, as established at Weimar, is an entirely new state. The constitution is the soul of the state. Destroy it, and nothing remains but a lifeless corpse. No state, therefore, can survive

its constitution. If this holds universally good, it may be asserted with special emphasis in the case of a federal state, which, as Dicey remarks, derives its very existence from its constitution. The preamble of the imperial constitution of 1871 runs as follows: "H.M. the King of Prussia on behalf of the North German Confederacy, H.M. the King of Bavaria, H.M. the King of Württemberg, H.R.H. the Grand-Duke of Baden, and H.R.H. the Grand-Duke of Hessen . . . conclude an eternal alliance. . . . This alliance will be called the German Empire and will have the following Constitution." Surely it is clear that the existence of the German empire was made dependent upon the preservation of the monarchies in the states. Since in November, 1918, the German princes all lost their thrones, their "eternal alliance" naturally came to an end. The German republic is not even an alliance of German states, but an entirely new structure erected by the undivided German people. It may be suspected that, with some at least of the writers, a political motive underlies this line of argumentation, on the one hand the wish to free Germany of the heavy load of hatred and prejudice accumulated during the long years of war, on the other hand the desire to prove that the young republic could not in fairness be called upon to repair the damage done by the old *régime*. No such motive can be imputed to the representatives of the German people. Again and again the identity of the new state with the old was insisted upon at Weimar, and it was just in order to demonstrate this identity that the National Assembly decided that *Deutsches Reich* was to continue to be the name of the German federation. Moreover, the desire of the German people, as expressed in the Preamble to the Constitution, "to renew . . . its Federation," excludes all idea of a newly founded state. This being so, it seems unnecessary to criticise in detail the above extravagances of constitutional doctrine, especially as the question is one of international, and not of constitutional, law; and if the test of international law is applied, viz., the substantial identity of

territory and of population, there can be no doubt as to what the answer will be.

Whilst, then, the German federation has undoubtedly remained the same state, a new chapter has opened in German constitutional history. The legal significance of the change which has taken place is the subject of controversy. Does it mean merely a further stage in the development of constitutional law or an entire break with the legal past? Both sides rely on Article 178: "The constitution of the German Empire of 16th April, 1871, and the law concerning the provisional exercise of the federal powers are repealed. All other laws and ordinances of the Federation remain in force, in so far as they are consistent with this Constitution." But since their readings of these clauses in substance differ no more than the two propositions, "Pre-revolutionary constitutional law remains in force, except in so far as it is herein expressly repealed," and "Pre-revolutionary constitutional law is hereby repealed, except in so far as it is kept alive by this article," the dispute would be one about words only if it were not for the supposed implication of the question of legal continuity with two other problems, viz., firstly, with that, already discussed, of the identity or non-identity of the German republic with the German empire, with which it has really nothing to do, and, secondly, with the question whether the Weimar text is now the sole source of constitutional law, to which it does not by itself supply a decisive answer. For granting that Article 178 does incorporate, by reference, such older constitutional statutes as remain in force, in the book of the republican constitution, it does not by any means follow that the latter is a complete code. It expressly leaves a good many subjects, great and small, to be regulated by ordinary acts of parliament; its second principal part, in particular, lays down a vast legislative programme, which it will take some generations to carry out completely. It would be doing violence to legal technical language to hold that all this huge body of laws, enacted and prospective, was constructively part of the Weimar

text. But even if this were conceded, there remain two other sources of law in competition with the written constitution, viz.:—

(1) Conventions, which have already begun to quite a considerable extent, not only to supplement, but also to modify, if not actually to supersede, express provisions. Some of them have so definitely crystallised as to find shelter in somewhat strange places, viz., in the Standing Orders of the Reichstag, the Federal Government, and the Reichsrat.

(2) Case-law. As an instance may be quoted the rules as to invalidity of parliamentary elections established by the Reichstag, in pre-revolutionary days, in the exercise of its jurisdiction over contested elections. The decisions given on constitutional issues by the newly-erected State Court for the German Federation will presumably, in course of time, form an important body of judge-made laws.

The German constitution, so far from being a complete code, in many places resembles a mere framework and often presents an unfinished appearance. The vacuum so created is filled partly by provisions elaborated with an amount of detail that seems certainly unjustified in an instrument which ought to contain nothing that is not fundamental, partly by the introduction of topics entirely foreign to constitutional law. Under the heading "Fundamental Rights and Duties," as will be shown, room has been found for ethical maxims, political commonplaces descended from the period of enlightenment, vague utopian promises, mere catchwords of party propaganda, and rules of ordinary law dragged from their resting-places in the criminal and procedural codes.

"This constitution makes the German republic the most democratic of all the democracies ever known." The federal minister who so congratulated the national assembly on the work which it had just accomplished, laboured under the delusion that there is magic power in a written text. As if democracy were but a stereotyped pattern of political institutions, and not a living spirit permeating the whole body

politic! If the practical working of a constitution depends, more than on anything else, on the material upon which its influence is brought to bear, it could never be expected that a people which had always been a model of docility and submissiveness to established authority, but had never learnt the art of governing itself, should all at once prove equal to the difficult task imposed upon it by its representatives at Weimar. Nor have hitherto the circumstances been favourable to the German nation adapting itself to the part which it is henceforth expected to play in shaping its own destinies. For never has true democracy flourished in a country exposed to pitiless pressure from without. Of the constitution itself it is certainly true that the democratic ideal is the foundation on which its whole structure is erected.

"The German federation is a republic. Supreme power emanates from the people." (Art. 1.) "Every state must have a republican constitution." (Art. 17.) The republican form of government is thus prescribed for the states no less than for the federation. It is not, however, placed under a special super-constitutional guarantee, as in France, where, according to Article 2 of the law of 14th August, 1884, it cannot even be made "*l'objet d'une proposition de révision.*" The second clause of Article 1 is copied literally from Article 25 of the Belgian constitution. In the latter its object is to assert the principle of popular sovereignty as underlying a system of government monarchical in form. Since the term republic connotes democracy, it is not at first sight apparent to what end the clause was inserted in the German text. Some of the commentators draw attention to the ancient Greek, and the mediæval Italian, city-states to show that there are such things as aristocratic republics. But it seems hardly fair to ascribe to the framers of the constitution either a desire to display a cheap erudition or an absurd classificatory pedantry. Others contend that the German empire itself had been a republic: since the sovereignty resided in the federated rulers of the states, the Bismarckian constitution was, not monarchi-

cal, but that of an oligarchical republic. However true this may be according to Aristotelian definitions, it is not at all likely that it appeared in that light to the national assembly. The events immediately preceding the election of that body supply the key to a more natural interpretation. The alternative which it is sought to negative was obviously a Soviet republic, of which Germany had just had a taste, and the proposition in question is intended to express the idea that supreme power resides in the whole people, and not in a class.

The clause which has just been discussed deserves attention for another reason too. It expresses a rule of constitutional law. Therefore, if it lays down the principle of the sovereignty of the people, legal, and not merely political, sovereignty must be meant. In other words, it seems to suggest that the constitution is founded on direct democracy. This is not, however, the case. A mixed type has been adopted. For though institutions characteristic of pure democracy have been largely introduced, as will presently appear, for practical purposes the representative principle is more important. Representation is on the broadest basis. Universal adult suffrage has been introduced, the minimum age prescribed being, if anything, too low. Women enjoy the right to vote on equal terms with men, their political disabilities having been removed in principle altogether. (Art. 109.) As the result of the extension of the franchise, the electorate is now three times as numerous as it has been before the war and is equal to about sixty per cent. of the total population. Again, the maxim "One man one vote" is rigorously adhered to. To afford all voters the same opportunity for exercising their right, all elections are to be held on Sundays or public holidays. In full appreciation of the fact that true democracy cannot co-exist with the tyranny of majorities, proportional representation has been adopted according to a system which ensures that every shade of political opinion, even if shared by a comparatively small number of voters only, shall have a fair chance of representation in parliament. Further safeguards

have been provided for the protection of the rights of minorities. One third of the members of the Reichstag have a suspensive veto on legislation, and even a smaller proportion may demand the appointment of committees of inquiry. Parliament itself consists of a single chamber. The president of the federation is also elected by the people. The fathers of the constitution, being catholic in their tastes, not only tried to combine direct and indirect democracy, but also attempted to blend the presidential with the parliamentary type of republican government: they hoped to secure the independence of the presidential office by making it plebiscitary. This novel experiment has proved, as might have been anticipated, an utter failure, and the executive is in practice purely parliamentary. The president is not only elected, but also liable to be recalled, by popular vote. Furthermore, for the first time in a large state, has direct legislation found a place in the constitution. The electorate is given the initiative and is made the final arbiter on laws by the provision of the optional referendum in a variety of forms. But however ambitious the scheme looks on paper, it will be shown in a later chapter that the machinery of direct democracy is extremely difficult to set in motion in Germany and most unlikely to yield any practical results.

In the German constitution democracy is not only the driving force in political organisation, but spreads its wings far over the social and economic fields. Its offspring are the twin-sisters liberty and equality, which rule supreme in the second principal part. The abolition of titles and orders and of privileges of birth (Art. 109) may serve as an example. With far-sighted wisdom have the builders of the constitution realised that democratic ideas, if they are to strike root in the nation, must be implanted in the breasts of the young. Hence the rule (Art. 146) that attendance at public elementary schools is compulsory for all children, irrespectively of the rank and station of their parents, admits of very few exceptions; and in respect of such exceptional cases it is expressly

provided (Art. 147) that private elementary schools are to be licensed only if "a separation of pupils according to the financial position of their parents is not furthered thereby." Again, the democratisation of industry is one of the avowed objects of the constitution. "Workmen and employees are called upon to co-operate, on an equal footing, with employers . . . in the general development of the productive forces." (Art. 165.) The principle of fraternity is thus relied upon to overcome the conflict between capital and labour and to seal one of the main sources of internal strife.

One of the ends of the German republican constitution, as defined by the Preamble, is to serve the cause of peace without, no less than within, and next to the democratic spirit that of pacifism and of international goodwill is its most manifest characteristic. One of the chief educational aims in all schools is the cultivation of the spirit of international reconciliation. (Art. 148.) It is significant that the army and navy are never called anything but "the defence force," and from the text of Art. 79 it follows clearly that they could not, without a breach of the constitution, be employed for any purpose other than national defence. The cumbrous process of federal legislation is prescribed for declarations of war. (Art. 45.) The insistence upon the consent of the Reichstag to the conclusions of alliances (*ibid.*) spells the doom of secret diplomacy, and contrasts favourably with the provisions of the French constitution, according to which secret alliances are permitted; for they are held to answer the description of treaties affecting the interest and security of the state, which the president is expressly authorised, by Art. 8 of the constitutional law of 16th July, 1875, to withhold from the knowledge of the chambers. Again, foreign territories cannot be incorporated in the German federation unless "their population desire it in the exercise of the right of self-determination." (Art. 2.) Hence foreign conquests are unconstitutional, and since such incorporations, as well as treaties of peace (Art. 45), require a federal law, parliament is constituted the guardian of this

constitutional principle. Imperial Germany had taken the lead in social legislation. Her republican successor, filled with the missionary spirit, engages (Art. 162) to promote an international labour code so as to secure for the working classes a general minimum of social rights. Such an undertaking sounds pathetic in the mouth of a people which, nearly five years after the end of the war, is not yet admitted to the council-chamber of the nations and is bound beforehand, by the treaty of peace, to accept certain future international conventions, in the conclusion of which it is denied a voice.

Perhaps the most remarkable provision in this connection is, however, Art. 4, according to which "the rules of international law universally recognised are deemed to form part of German federal law and, as such, have obligatory force." Half a confession and half a protest, and withal a promise of better things for the future, it was obviously inspired by the well-known charges formulated both during the war and in the treaty of Versailles. But the article has a legal, as well as a political, side. In the first place, international law being placed under the protection of the constitution and incorporated in German federal law, a breach renders the federal minister responsible for it liable to impeachment. (Art. 59.) In a more technical aspect, the clause abandons the German conception of international law in favour of that adopted in England and the United States. German jurisprudence had hitherto interpreted international law as being *ius inter gentes* in the strictest sense, as a law the subjects of which are states alone, and which could not, therefore, confer rights or impose duties on the citizen, unless it had first been converted into state law by the process of municipal legislation. For the future Article 4 operates as an automatic transformer, and brings the German conception into line with that of Anglo-Saxon jurisprudence, according to which international law is part of the common law. In England this doctrine is not consistently adhered to, since a judge may require a rule of international law to be proved, much like a rule of foreign law.

In the United States the logical conclusion is drawn that the courts must take judicial notice of its provisions. Germany now follows the American practice; since they are "deemed to form part of German federal law," the principle "*iura novit curia*" applies to them. The following points deserve notice:—

(1) The article under consideration applies only to general rules of international law, not to the provisions of treaties concluded with foreign powers. If the latter are to be made binding on the citizens, a federal law is still necessary. *E.g.*, for the individual German the peace of Versailles derives its obligatory force not from the treaty itself, but from the federal law of 31st August, 1919, passed to give effect to that instrument.

(2) The German text is somewhat ambiguous and leaves it in doubt whether a rule of international law to become part and parcel of German federal law must be "generally" or "universally" recognised. The German authorities all interpret it in the latter sense and take it for granted that a rule refused recognition by Germany does not come up to the standard required.

(3) The rules of international law are part of German federal law. Hence their validity is equal, not superior, to that of the latter. Indeed, if such a rule conflicts with a federal statute, a presumption is raised that it is not recognised by Germany, therefore not universally recognised. The judge must therefore refuse to apply it.

(4) Being part of federal law, the rules of international law override state law. (Art. 13.)

According to German writers, one of the chief merits of the new constitution is that it causes the rule of law to triumph all along the line. It is true, additional safeguards have been provided for the independence of the judges, and the setting up of exceptional tribunals is forbidden. But the claim is founded mainly on the fact that the constitution prescribes the erection, by the side of the ordinary courts, of a State

Court for the adjudication of disputes in the sphere of public law and, both in the federation and in the states, of administrative tribunals for the protection of the rights of the citizen from abuses of executive power. A title to fame based on the latter ground and all that it involves will not specially appeal to English readers.

One very important feature remains to be studied, the system of federalism adopted in the German constitution. The question naturally suggests itself why Germany, in the critical situation in which she found herself, and confronted, as she was, with the task of setting her house in order on entirely fresh lines, did not take the decisive step from federalism to unitarism, which seemed to offer the best guarantees of stability and, at the same time, the greatest chances for the recovery of national strength. The main obstacle to complete German union had disappeared, viz., what Bismarck once described as a most ungodly and unrighteous swindle, the sovereignty of the German princes. A petty potentate, sitting on his throne and surrounded by all the paraphernalia of state, with a privy council of his own, with his local diet and his local officialdom, might well be disinclined to sacrifice his exalted position, even if his realm extended to no more than a few dozen square miles. But all this had been changed, and the pretensions of princes no longer stood in the way of higher national interests. Unfortunately, however, in the course of centuries allegiance to the local ruling house had to a certain extent been converted into a local patriotism of a peculiarly narrow order. Often, too, petty intertribal antagonisms, reinforced in some cases by differences of religion, seemed even stronger than tribal cohesion. Moreover, the distribution of centripetal and centrifugal forces largely follows the lines of social differentiation. The upper strata of society in Germany have an essentially national outlook, but the latter is intermixed with strong monarchical leanings. The middle classes, both in the towns and in the country, are the backbone of the movement for the preservation of state rights. The fourth

estate alone combines a preference for the unitarian state with love of republican forms; but it did not prove strong enough to carry the day. So it came about that the Preussian draft, which foreshadowed, though it did not actually introduce, the unitarian state, was brought to grief by the opposition of the states. The second draft, settled between the federal government and representatives of the governments of the states, in this respect left matters much where they had been under the imperial constitution. But the impulse to centralisation appears to be inherent in federalism, as shown, for instance, by the more recent history of the Swiss Federation, and the constitution, as finally enacted at Weimar, has enormously increased the powers of the federation at the expense of the states and, at the same time, largely curtailed the share which the latter previously had in federal government. It is far in advance of public opinion in the tremendous step which it has taken towards unification, and the evolutional forces set in motion by it, if allowed to work themselves out undisturbed, are sure to bring about the simple national state. Even now the states are reduced to such puny stature that some authors of repute claim that they are no longer entitled to that name, but are no more than self-governing provinces of a unitarian state with decentralised administration. Before this contention can be examined, it is necessary to study the relations between the federation and the states, as established by the constitution, and, first of all, the division of powers between them.

CHAPTER II.

THE FEDERATION AND THE STATES—I.

Division of Powers.

Progressive centralisation has been a common feature in the history of the three principal federal states of the modern world. It is least marked in the United States of America, the first constitution of which, dating from the eighteenth century, is still in force. But even here the functions of the Union have been considerably expanded by the doctrine of implied powers, as elaborated mainly by Chief Justice Marshall. In Switzerland this developmental tendency is clearly shown if the Napoleonic *Acte de médiation* of 1803 is compared with the federal constitution of 1848, and the latter with that of 1874. Since then interpretation has worked in the same direction, and what could not be done within the four corners of the constitution has been accomplished in direct violation of it, a feat rendered easy by Article 113 of the federal constitution, which withdraws federal laws from the control of the courts. Thus the whole of civil and criminal law has been transferred, during the last few decades, to the national legislature, and the construction of federal railways has further added to the powers of the central government. In Germany the balance of powers between the federation and the states has been completely upset by the new republican constitution, the centre of gravity, both in legislation and in administration, having shifted on towards the former. Yet the old principle has been retained in the distribution of functions, and, as in the Bismarckian constitution and in the constitutions of the United States and of Switzerland, it is the powers given to the federation that are enumerated.

Four kinds of federal legislation are distinguished, viz., exclusive, concurrent, needful, and normative. The subjects entirely reserved to the federation, as enumerated in Article 6, are foreign relations; colonial affairs; nationality, freedom of movement within federal territory, immigration, emigration, and extradition; national defence; coinage; customs and internal free-trade; the postal, telegraphic, and telephonic services. The list is not, however, complete. The constitution itself adds in Article 165 the organisation of workmen's and economic councils and the regulation of their relations to other self-governing social bodies. The following topics, though not expressly mentioned, obviously come likewise under this heading:—

(1) The federal constitution, and all matters pertaining thereto, *e.g.*, the organisation of the federal government departments, the federal civil service, the Reichstag franchise, etc.

(2) The federal budget.

(3) Institutions now the property of the federation and organised as federal services, such as railways and waterways.

(4) Subjects which have been regulated exhaustively by federal laws, so that there is nothing left for the state legislatures to add.

As if the term "exclusive legislation" did not sufficiently convey it, the constitution expressly lays down in Article 12 that its field is forbidden ground to the states. It is closed to them even if the federation does not exercise its powers. Until it does the existing state laws remain in force and are incapable of amendment, however antiquated or mischievous in their operation they may be. The evils resulting therefrom would be quite intolerable if it were not for the fact that most of the above topics have already been dealt with by imperial legislation.

The term "concurrent legislative powers," as generally used in constitutional literature, though not in the constitution

itself, is not well chosen. Of course, nothing but confusion would result if the federation and the states were to compete in the same legislative field. What is meant is that "so long and in so far as the federation has not made use of its legislative powers, the states continue free to legislate." (Art. 12.) That is to say, the federal legislator has an overriding claim, but the states may—

(1) legislate on such subjects as regards which the former does not exercise, or has not yet exercised, his powers;

(2) regulate by state law such parts of the subject as the federal legislator has left open.

Federal legislation on these topics, then, is optional, state legislation provisional and supplementary. The catalogue given in Article 7 is very lengthy and comprises, besides minor matters, the following subjects: civil and criminal law and procedure; passports; poor-law; the press, the rights of association and of public meeting; the problem of population, maternity and infant care, protection of children and the young; public health; labour laws, including industrial insurance and labour bureaux; the organisation of professional and occupational chambers; expropriation; the socialisation of natural resources and economic undertakings, and the production, distribution, and regulation of prices, of economic commodities under social management; trade, weights and measures, paper-money, banking and exchanges; traffic in foodstuffs; industry and mining; insurance; navigation and fisheries; motor transport; theatres and cinemas. Since some of the topics here enumerated have been completely regulated by federal laws, they fall in fact, if not in theory, under the heading of exclusive legislation. The federation cannot prevent the states from dealing with any of the subjects as to which its powers are merely concurrent except by exhaustively regulating the matter itself. To this rule there is, however, one exception. The constitution (Art. 12) confers on the federal authorities the right to veto socialisation by the states

if the national welfare is likely to be affected prejudicially thereby. A concurrent power of special importance is vested in the federation by Article 8, which establishes its supremacy in matters of finance. This article authorises the central legislature to tap every possible source of revenue and to regulate completely the levying even of those taxes of the proceeds of which part only is claimed for national purposes. The German republic has already made ample use of the power here conferred. It is obvious that this right might easily be exercised in such a way as to jeopardise the very existence of the states by the withdrawal from them of the *nervus rerum* and with the oblique intention of bringing about in such manner the unitarian state. To guard against such a contingency, the constitution prescribes that, in laying hands upon sources of revenue that hitherto flew into the coffers of the states, the federation is to pay due regard to the vital needs of the latter—a pious recommendation, but no sort of guarantee.

"In so far as there is need for uniform regulation, the federation may legislate upon all matters concerning

"(1) the public welfare,

"(2) the maintenance of public order and security."

(Art. 9.)

In form merely a conditional concurrent power, the authority herein conferred on the federation covers the whole area of possible legislation. Maintenance of public order and security has been the end of the state since the dawn of history and, coupled with the promotion of public welfare, its object in the modern world. Hence it would be difficult to discover any legislative measure that does not square with one or the other of these two aims. The article is in fact an omnibus clause, in the face of which the careful classification and minute elaboration of federal legislative powers appear unreal and meaningless. Its true significance is well brought out if it is placed side by side with the similar provision of the South Africa Act, by which the Union Parliament is empowered to enact any law "for the peace, order and good government"

of the Union; here, it must be remembered, it is the provincial legislative councils whose powers are specified and defined. The qualifying condition in Article 9 may be intended to be a perpetual warning against federal legislative polypragmasia, but does not really in any way restrict the authority conferred. For, on the one hand, in a federal state the central legislature will not, as a matter of course, in any case deal with matters of purely local interest, but only with those which require uniform regulation on a national basis. On the other hand, the federation is the sole judge of the need spoken of in the article.

Normative legislation implies a division of labour between the federation and the states, the former laying down general principles, the latter filling in the necessary details. The topics which may be so jointly regulated, as defined in Article 10, are the status of religious bodies; public education; the rights of officials of all public corporations; land laws and land policy, including, *i.a.*, housing; the disposal of the dead. A normative federal statute at once abrogates state laws, and bars further state legislation, inconsistent with its tenour. But whether it creates law immediately binding upon the subject or merely lays down directions for the guidance of the state legislatures, and whether, in the latter case, the states are obliged to pass laws to give effect to those principles or only to refrain from enactments incompatible with them, are matters of dispute. The constitution itself, however, appears to supply an answer to these questions. The national assembly did not allow the grass to grow under its feet, but proceeded, in the second principal part, at once to prescribe principles, as authorised by this article, for the regulation of most of the subjects therein mentioned. The reason for this haste was identical with one of the main motives which had prompted the invention of the normative type of legislation. In some of the states power had fallen into the hands of extremists, and it was hoped that the federal legislature, the members of which were distinguished by greater moderation and more far-

sighted statesmanship, would thus be enabled to prevent irreparable mischief resulting from ultra-revolutionary zeal. Now in one instance at least, viz., when dealing with religious bodies, the constitution prescribes that the state legislatures may "enact such provisions, if any, as may be required to give effect to these principles" (Art. 137)—a clear indication that the latter are at once clothed with the full force of laws. In a few cases the exercise, by the federation, of its normative powers, merely optional according to Article 10, is made compulsory, as for the regulation of the status of officials (Art. 128) and for the definition of the conditions under which denominational schools may be established. (Art. 146.) Besides, under the headings "Social Life," "Religion and Religious Bodies," and "Education and Schools," principles are elaborated in such detail as no longer to justify the use of that term. Its interpretation being left to the federal legislator, there are no lengths to which his normative powers may not be carried. In the exercise of a similar authority, conferred in Article 11, the federal parliament may prescribe general principles to govern state taxation, but only if such regulation is necessary for the protection of important social interests or for the prevention of certain specified evils, such as loss of revenue to the federation, double taxation, or discriminatory treatment of home products and commodities imported from other German states. A statute, dated 30th March, 1920, on state taxation has accordingly been enacted, which, on the one hand, exceeds the constitutional powers of the federation by actually requiring the states to impose certain taxes, but, on the other hand, affords them a certain protection against their arbitrary use. For it enables the federal minister of finances and the state governments alike to appeal to—

(1) the Supreme Finance Court for a decision whether a revenue law of a state is consistent with federal law;

(2) the Federal Council for a pronouncement upon the question whether a state tax tends to prejudice federal

revenue or otherwise to conflict with paramount federal interests.

Confronted with this almost all-embracing catalogue of federal powers, the reader might be tempted to regard it as a bad joke if he is told that the authority of the states in legislation is presumed. Yet this contention follows with unavoidable logical necessity from the theory of enumerated powers. Unto the national assembly it must be counted for righteousness that the constitution allows this to be inferred, without expressly saying so. It might have been difficult to gather whercin the residue of legislative powers left to the states really consists, if the task had not been accomplished by a distinguished German writer, Professor Hatschek; but even his list requires some qualifications, here added in brackets. It runs: (within the limits prescribed by the federal constitution) self-organisation, *i.e.*, the constitutional law of the state; local self-government; agriculture and forestry, excluding agricultural labour; the fine arts; public welfare and security (in so far as not embodied in federal statutes, enacted for the sake of uniformity); (and subject to the general principles laid down or to be laid down by federal legislation, the detailed regulation of the following matters, viz.,) housing and settlement on the land; the status of officials; church and education; taxation.

"Federal law overrides (literally, 'breaks') state law." (Art. 13.) This legal aphorism, borrowed from the jurisprudence of the Holy Roman Empire, seems to express, in condensed form, exactly the same idea as Article 6, section 2 of the United States Constitution: "This constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." But the resemblance is merely superficial. The American text asserts no more than the supremacy of the federal constitution. An Act of Congress inconsistent with the con-

stitution is not a law "made in pursuance thereof" and would be treated as null and void by every American judge. Nor would an American Court hesitate to recognise as valid and to apply a state law that conflicts with a federal statute suffering from such congenital defect. In Germany, not the federal constitution, but the federal legislature is supreme. Every judge in the land is bound to accept a federal law at its face value, without inquiring whether it is compatible with the constitution. Any law, therefore, made by, or under the authority of, the Reichstag, a mere federal ordinance, has a validity superior to, and overrides, any state law, even the constitution of a state. Strange as it may appear in the case of a federal state, the German constitution entirely adopts the British conception of the sovereignty of parliament. Nor is it alone in doing so. The Swiss federal constitution laid down in explicit terms a rule of similar import in Article 2 of the "Transitional Provisions," and modern Swiss jurisprudence has evolved a doctrine identical with the German one as a deduction from the sovereignty of the federation. In Germany, a federal law not only overrides a state law: it attacks it, breaks it to pieces and utterly destroys it. Nor is it necessary that its wrath should be excited by a conflict. A state law receives the same pitiless treatment "whether it is inconsistent, identical with, or interpretative of, a federal law." And so complete is its annihilation that it can never revive, even if the federal statute itself is repealed. No wonder that according to the prevalent opinion a state legislature may not reproduce the terms of a federal law. In Germany the jurisdiction of the courts had hitherto been limited in a similar way as it still is in the United States, where the judges have consistently refused to pronounce on the validity of a law unless the question arose incidentally as a point relevant to the issue in a pending suit. And whilst conclusive as to the case *sub judice,* a decision did not abrogate the condemned law. All this is now changed in Germany by the new constitution, which provides in Article 13 that in case of doubt or of

difference of opinion about the consistency of a state law with federal law, either the central or the state government may appeal for a decision to a supreme federal tribunal. It is no longer necessary to bring a test case to trial in order to obtain an adjudication upon such a question; a doubt or a difference of opinion enables it to be submitted, as an independent issue, to the highest tribunal. Of course, it is always the validity of the state law that forms the subject of doubt or of difference of opinion; that of federal law is immune from either. Hence the true object of the clause becomes apparent: it is to place state legislation under the supervision and control of the federal government, such control to be exercised in judicial forms. A federal statute of 8th April, 1920, has conferred the jurisdiction on the Reichsgericht; it further enacts that the judgments of that court are to have the force of laws and are to be published in the Federal Law Gazette. Several cases have already been decided under this clause: *e.g.*, a Bavarian law forbidding female teachers to marry under pain of losing their appointments, has been pronounced invalid, as being inconsistent with Article 128 of the federal constitution.

In the United States the principle of the separation of powers is carried out completely, not only in the organisation of the central government, but also in the distribution of functions between the Union and the states. A sharp line of demarcation divides the spheres of their respective activities. It is an unwritten maxim of the constitution that federal laws are executed by federal officials, the field of central administration being thus co-extensive with that of federal legislation. To this rule there are but a few unimportant exceptions, the machinery of the states being utilised for federal elections, for naturalisation, and for carrying out measures of quarantine. This system, which was at one time thought to be an essential characteristic of the federal state, was adopted in America on peculiar historical grounds, the want of a common executive having been felt to be the chief source of weakness of the Confederation. Both in Switzerland and in Imperial

Germany the opposite method found favour: in principle, the execution of federal laws is left to the states, and only for special purposes have federal services been organised. The new republican constitution follows substantially the same plan. "The federal laws are carried into execution by the state authorities, in so far as the federal laws do not otherwise provide." (Art. 14.) It will be noted, however, that only an ordinary federal statute, and not an amendment of the constitution, is required to transfer the administration of any department from the states to the federation. In respect of one important branch, as will presently be shown, viz., the administration of taxes, the power here conferred has already been used. But the constitution itself has established, in Section VI, a wide field of central administration, extending the direct federal executive far beyond the area which it had occupied before the revolution. Broadly speaking, in the sphere of exclusive federal legislation federal administration is the rule, outside it the exception. Tribal peculiarities and incompatibility of tempers resulting therefrom are responsible for the precautionary rules of Article 16, the convenience of the officials themselves being also consulted in its second clause: "The officials entrusted with the direct federal administration in the states shall, as a rule, be members of the state in which they are employed. Officials, employees and workmen in the service of the federal administration shall, at their request, as far as possible, be employed near their homes, unless considerations of training or the exigencies of the service stand in the way."

The following are the principal branches of direct federal administration:—

(1) Foreign affairs. "The administration of the relations with foreign states is the business of the federation alone." (Art. 78.) The first among the subjects, enumerated in Article 6, on which the federation has sole power to legislate, is "Foreign Relations." The difference in wording is intentional, the term "Relations with Foreign States" being here

chosen in order to enable Bavaria, the premier catholic state in the federation, to continue to hold direct diplomatic intercourse with the Holy See, which, of course, is not a state. The above clause is held to divest the German states of their character of subjects of international law. It was therefore thought incongruous and to betray an entire misunderstanding of the structure of the German federation that the German plenipotentiaries were compelled to sign the treaty of Versailles on behalf of the states as well as of the federation and, again, that in Articles 340, 341, 347 and 355 of that instrument the German riparian states were given seats on international river boards, whilst the federation is unrepresented thereon. A preliminary answer to these objections is that the dates of the signature and of the ratification by Germany of the treaty are both pre-constitutional. But quite generally, constitutional provisions of a state are not necessarily conclusive in international law, though the latter recognises an established state of affairs. Nor is it at all clear that the Weimar constitution takes up that intransigent attitude towards the states which most commentators attribute to it. It was just mentioned that Bavaria, with the authority and consent of the federation, cultivates diplomatic relations with the Vatican, and as to the right of legation international law knows no distinction between sovereign states and sovereigns that are not states. The outcry against the alleged lawlessness of the French in establishing an embassy at Munich was not therefore quite justified. You cannot approbate and reprobate. Again, the treaty-making power is vested in the federation; but this rule, too, admits of an exception. "In those matters which the state legislatures have power to regulate, the states may conclude treaties with foreign states, subject, however, to the consent of the federation." (Art. 78.) This provision is distinctly puzzling. Some writers maintain that in concluding such treaties the states exercise a delegated federal authority, and that the consent of the federation really means ratification by the principal. This interpretation seems

untenable. For there is nothing in the text to show that these treaties are binding on the federation, and the topics to which they refer seem to negative any such intention. Altogether, since the regulation of everything pertaining to foreign relations belongs to the exclusive province of the federation, there does not appear to be room for "matters which the state legislatures have power to regulate." A somewhat similar power is conferred on the cantons in Article 9 of the Swiss Federal Constitution in respect of the subjects therein specified, such as frontier traffic and frontier police; and from what transpired at Weimar during the deliberations on Article 78 it is obvious that the provision is meant to refer to matters of the same kind. However limited, then, the extent to which the states may cultivate foreign relations, they are *pro tanto* still subjects of international law, and the proposition that relations with foreign states are the concern of the federation alone is not literally true.

(2) National defence. (Art. 79.)

(3) Colonial affairs, according to Article 80 "exclusively the business of the federation." This provision was inspired by hope in the future. For Germany has not now any colonies.

(4) Finances. The constitution provides (Art. 83) that "customs and excise are administered by federal authorities." The administration of all other taxes, of direct taxes in particular, was left to the states, but power was conferred on the federation (Art. 84) to provide by statute for uniformity in the execution of federal finance laws, for the supervision to be exercised over their administration, for the settlement of accounts with the states, and for the reimbursement of costs incurred in the collection of federal taxes. Not a month had elapsed after the constitution came into force before this policy was completely reversed in the law on the administration of federal finances, the provisions of which were subsequently incorporated in the law of 13th December, 1919, on the regulation of federal taxes. According to par. 8 of the latter

statute "all federal taxes are administered by federal authorities. All taxes are deemed federal which are raised, either wholly or in part, for the benefit of the federation." Nor is this all. Instead of federal taxes being any longer administered by the states, it is provided in par. 19 that "at the request of the state governments the administration of state taxes and of state property may be transferred to the federal authorities," the complete extinction of state administration in the realm of finances being thus calmly contemplated. Nay, so entirely are the states ignored that the federal minister of finances may entrust parishes and unions with the assessment and collection of certain federal taxes. (Par. 22.) The only consideration shown to the states is that clause 2 of Article 83 enacts that "in the administration of federal taxes by federal authorities arrangements are to be made so as to permit the states to safeguard their special interests in the sphere of agriculture, trade, manufacture and industry."

(5) The postal, telegraphic and telephonic services. (Art. 88.)

(6) Railway administration. In compliance with the prescription of Article 89 the federation has taken over the ownership of all German railways "which serve for public traffic" and now administers them "as one single undertaking."

(7) Administration of waterways. In Articles 97-100 of the constitution an ambitious scheme is elaborated according to which the federation is "to take over the administration and ownership of all waterways which serve for public traffic," *i.e.*, all navigable rivers and canals. Very little remains of this grandiose plan. For by Articles 331-364 of the treaty of Versailles all the more important German rivers, together with their tributaries, as well as the Rhine-Danube canal, when completed, are internationalised and placed under the control of international boards, on none of which the German federation has a seat.

(8) Administration of light-houses, light-ships, and other marks for navigation. (Art. 101.)

Where, as in the United States of America, the functions of the federation are sharply divided from those of the states, and no common ground exists on which they meet, there can be no room for supervision of the latter by the former. The only control possible is that which the courts exercise by restricting each to its legitimate sphere of activities. But where, and in so far as, federal affairs are administered by the states, the latter are, as it were, mere subordinate executive organs of the central government and, therefore, subject to its control. Both the Swiss and the German federal constitutions accordingly provide for it, but the latter goes further than logical necessity demands. For it enacts in Article 15 that "the federal government exercises supervision in those matters as to which the federation has the right to legislate"; that is to say, federal supervision is not limited to the ground actually covered by federal law, but extends as far as federal legislative powers, whether exclusive, concurrent, needful, or normative. But the nature and scope of the control differs in the two cases, and German writers, following Prof. Triepel, distinguish "dependent" (*i.e.*, dependent upon the enactment of a federal statute) and "independent" federal supervision. The aim of the latter is, as was explained in the Committee on the Constitution, to keep a watchful eye on the states that they do nothing prejudicial to federal interests, that they perform their constitutional duties, and, in particular, that they do not defeat federal ends by anticipatory measures. Furthermore, from the very meaning of the term "supervision" flows the right of the central government to call on the state authorities to supply it with information, to collect for it statistical data, and to carry out other investigations and inquiries. Far wider are its powers of "dependent" supervision. The necessary administrative ordinances for the execution of federal laws by the states are issued by the federal government with the consent of the Reichsrat (Art. 77) and are addressed to the ministries of the states. The federal government is further authorised, in Article 15, to issue more detailed general instructions. This

latter clause has given rise to doubts and disputes in two directions. In the first place, it is not clear whether in this instance too the consent of the Reichsrat is required; a second controversy turns on the question whether such instructions may be laid down for the guidance of the state ministries only, or whether the central government may go behind them and give such instructions to subordinate state authorities. The federal government may, from time to time, despatch commissioners to the state ministries and, with the consent of the latter, to the subordinate state authorities to exercise what is called administrative supervision, the object of which is to make certain that the states do what is both lawful and expedient in the execution of federal laws. The states are under a constitutional obligation, at the request of the central government, to remedy any defect discovered, and they are bound to do so even if they deny its existence. But if such a difference of opinion exists "either the federal government or the state government may appeal for a decision to the State Court, unless another tribunal is named in a federal law." (Art. 15.) Since the subject of controversy is a question of administration, the other tribunal here spoken of would presumably be the Federal Administrative Court. The judgment of the tribunal is executed, if need be, by the president of the federation. (Art. 19.) In being thus enabled to appeal to an independent judicial or quasi-judicial authority, the states enjoy a privilege denied to the Swiss cantons. The fact that proceedings are pending does not, however, absolve them from the duty of immediate obedience to the dictates, here euphemistically called requests, of the central government. For the president of the federation need not wait for the judgment of the court, but may at once intervene, if necessary with the aid of armed forces, to compel a recalcitrant state to make good its alleged breach of duty. (Art. 48.) A type of federal supervision of an entirely different character remains to be noticed. The Committees of Enquiry of the Reichstag, endowed with very large powers by Article 34, may exercise an efficient

control by exposing the activities of the states in federal matters to the searchlight of parliamentary investigation.

In the distribution of the fields of legislation and administration between the federation and the states three main areas may then be defined:—

(1) That reserved to the autonomy of the states, within which both classes of powers are entirely vested in them.

(2) At the other end, that claimed by the federation as exclusively its own; within it federal laws are executed by federal officials.

(3) An intermediate area, divided between the federation and the states, the former exercising the powers of legislation and supervision, the latter executive authority.

Whilst in legislation the powers of the federation are almost unlimited, and in administration considerable and on the increase, in the third main branch of government, the administration of justice, the lion's share belongs to the states. The ordinary law of the land, both civil and criminal, in all its branches has long since been codified on a federal basis, and in order to secure uniformity in its administration a federal tribunal has been established as the final court of appeal, the Reichsgericht in Leipzig. It is the only regular law-court of the federation, and its original jurisdiction is quite insignificant. It is somewhat questionable, however, whether the states are secured in the enjoyment of this valuable power. The authorities are agreed that the administration of justice is a branch of the executive and as such *primâ facie* liable to be transferred from the states to the federation by an ordinary federal statute, under the authority of Article 14. The better opinion, however, seems to be that Article 103, "The ordinary jurisdiction is exercised by the Reichsgericht and by the courts of the states," is in the nature of a constitutional guarantee, intended to save the administration of justice from the operation of Article 14.

CHAPTER III.

THE FEDERATION AND THE STATES—II.

Their Constitutional Character.

THE Weimar constitution, as was shown in the preceding chapter, has distributed its favours with so uneven a hand that not a few authors of repute argue that the transformation of the German federation into a unitarian state is an accomplished fact. Political omnipotence, they hold, is now an attribute of the central government, whilst but traces are left in the states of that vitality, for the preservation of which the constitution itself, on more than one occasion, pleads in terms. By some writers the claim is based on the allegation that the states are "no longer" sovereign. They obviously accept at its face value the false coin of titular sovereignty, as issued by the princes in Imperial Germany, and overlook that true sovereignty of the states is incompatible with the very nature of a federation. And it makes no difference if the constitution itself honours them with that title: the Swiss cantons cannot pretend to it even though the federal constitution confers it no less than thrice upon them. In Article 3 indeed it lets the cat out of the bag, "The cantons are sovereign, in so far as their sovereignty is not limited by the federal constitution"—a conception which, though generally abandoned by American constitutional doctrine, still lingers on in some of the writings, of which the following may serve as an instance: "In other respects each state has full and complete jurisdiction and all the attributes of sovereignty over every thing and person within its borders." (Foster, Commentaries.) If it is admitted that the expression "part-sovereign states" contains a double contradiction in terms, it follows that no unit of a

federation answers the description of a state, and that the states of the American Union are, in Austinian phraseology, states improper, or improperly so called. The German constitution has taken special care to evade the issue by choosing a purely geographical, and politically neutral, term, viz., Länder, *i.e.*, lands or territories. A school of German professors, however, appreciating that the claim to sovereignty by the states was untenable even under the Bismarckian constitution, but anxious all the same to preserve for them the character of states, had long since advanced a definition, in which sovereignty is not a necessary ingredient. All that is required is that such powers as they have, however limited in scope they may be, are original and independent, and not derived from any superior authority. In this sense, it is maintained, the German territories are still states. For "though subordinate to the federation, they are political communities possessed of powers which belong to them in their own right, and not in virtue of federal delegation" (Anschütz). This line of argumentation seems to be inspired by a curious confusion of historical fact with juridical interpretation. The powers of the states are undoubtedly original, and not derived from any superior authority, in the sense that they belonged to the states before the latter were members of the federation and represent, in point of fact, the residue of their one-time sovereignty. For it is true alike of the American, the Swiss, and the German federation that in each instance the states are older than the Union. But what is now left to them by the federal constitution and is recognised therein as theirs, is surely, in the legal sense, derived from it and constructively delegated by the Union. The supporters of the doctrine under consideration claim, however, that the Constitution sides with them if it lays down in Article 5 that "public power is exercised in federal affairs by federal organs in accordance with the federal constitution, and in affairs of the territories by the organs of the territories in accordance with the constitutions of the territories." But there is nothing in this text incon-

sistent with the alternative view. Moreover, it will be seen, this article speaks only of the exercise of public power and does not touch upon the question where that power resides. This information the Constitution has already vouchsafed in Article 2, where it is stated that supreme power emanates from the people.

If, then, it is an affliction common to all federations that their units are neither sovereign nor states in the real sense of the word, it would seem idle to carry further the inquiry whether under the Weimar constitution the German territories are anything more than the provinces of a decentralised unitarian republic. From the standpoint of constitutional jurisprudence the objection appears unanswerable. For the law knows no *tertium quid* besides sovereignty and dependence, and since both states metaphorically so called and provinces bear the mark of subordination, the difference being one of degree only, it can supply no criterion whereby to distinguish between the two. But the problem has its psychological and political aspects as well. Historical reminiscences and associations keep the idea of the state vividly alive in the minds of the peoples, and especially of its own subjects, long after it has ceased to bear its juridical attributes, and retrogressive metamorphosis must have advanced very far indeed before it is entirely extinguished. Again, the states of a federation generally exercise powers different in kind from, and far in excess of, anything that a unitarian state would ever concede to its administrative units, however far the principle of local self-government were carried. The concrete question to be answered, therefore, is whether the degeneration and degradation of the German territories is so far advanced that they have become indistinguishable, or almost indistinguishable, from mere provinces.

A great deal has been made of the fact that the German territories can be deprived of every single power which is still left to them, nay of their very existence, by mere alterations of the federal constitution. As if the same were not true in every federal state. The Swiss constitution significantly pro-

vides for its own total revision, and there is no change, however revolutionary in character, that may not be carried through in a peaceful way by an analogous process, in unitarian no less than in federal states. It is true, none of the rights of the German territories is protected by a super-constitutional guarantee, as is, for instance, the right of the states to equal senatorial representation under the American constitution. But it must not be overlooked that rights are not absolutely safeguarded even by such special guarantees, since they may be taken away all the same, at a second remove, by constitutional amendments. What is of real importance in this connection is the ease or difficulty with which the federal constitution can be altered and, even more so, the extent to which the consent of the states is required to such alterations. In both these respects, it must be owned, the German territories are in a much worse position than either the Swiss cantons or the American states. For the German constitution, though technically rigid, offers, as will be shown in a later chapter, a relatively low degree of resistance to attempts to change its form, and amendments are effected by the process of legislation, in which the territories have no direct share whatever. This evil is further aggravated by the striking inequality in the population of the German territories, so that amendments of the constitution may be carried with the requisite two-thirds majority in the Reichstag by the votes of the representatives of the larger states against the will and to the detriment of the smaller ones.

This extreme inequality in the size and power of the states was, perhaps, the greatest difficulty with which the German federation has had to contend since its foundation. There has never been another federation in which one of the component parts contained the greater half of the federal territory and of the national population. Besides, the Bismarckian constitution had loaded the dice so much in favour of this one state that the German empire was, as it were, but an overgrown Prussia. Good care was taken at Weimar to do away with the

Prussian hegemony, and such privileges as she now possesses are all of the odious and onerous variety. And though Prussia has honestly and honourably accepted her change of status from master to partner on equal, and perhaps less than equal, terms, such are her natural advantages that the federation still seems top-heavy, and her giant stature prevents those ancient jealousies from subsiding which her former undisputed preponderance had engendered, and which now seem to endanger the existence of the national state. Moreover, her extensive area being largely the fruit of successive conquests, there is a lack of internal cohesion which a most capable and efficient administration could conceal in the days of her prosperity, but which was bound to make itself felt now that the country was reduced to misery and distress. Neither racial affinity nor identity of economic interests nor the bond of a common religion exist, *e.g.*, between the man of East Prussia and the Rhinelander, and there was the risk that some of the eccentric provinces might yield to foreign blandishments or foreign pressure and break away from the federation, if only in the hope of thereby escaping from some of the burdens under which Germany is groaning. It seemed that the dismemberment of Prussia was the only alternative to dismemberment of the federation. Indeed, in defining the composition of one of the federal organs the constitution proceeds as if the Prussian provinces had already attained the rank of federal territories —by the side, it is true, of the Prussian state—viz., in allowing these provinces to send delegates to the Reichsrat (Art. 63), which has been "formed for the representation of the German states in federal legislation and administration." (Art. 60.) Prussia, on the other hand, has been busy in decentralising her administration and granting her provinces a large amount of self-government, so as to make them feel comfortable in her own house. At the other hand of the scale are those grotesque dwarf formations, some of them smaller in area and in population than a small English county. If their political horizon were ever to grow beyond the three dimen-

sions of the parish-pump, if they were to become useful and efficient elements in the federation, the only road to salvation lay in amalgamation. In this way the free state of Thuringia has been fashioned out of seven more or less diminutive principalities. The proximate object of the framers of the constitution, then, was, by dissolving Prussia into her provinces on the one hand, by fusion of the smaller states on the other, to reduce the national state to the normal type of a federation of reasonably equal units. This being their policy, they could not, of course, contemplate with equanimity the perpetuation of the given condition of things. Far less could they follow the example of other federal constitutions and guarantee the continued existence of the states. Nor again could it any longer be left to the discretion of the states to make territorial changes by treaties, as they had been entitled to do under the imperial constitution. National interests must prevail. The leading principle in the territorial organisation of the federation, as enunciated in Article 18, is henceforth to be "the highest economic and cultural efficiency of the people, the wishes of the population concerned being taken into consideration, as far as possible." It is the business of the federation to see that the territorial rearrangements necessary to that end are carried through. In principle territorial alterations within the federation are effected by federal law passed in the form required for amendments of the constitution. Such a statute is not, however, an amendment of the constitution; for the latter nowhere defines or fixes either the number of states or their respective boundaries. An ordinary federal law suffices if the states immediately concerned concur in the proposed alteration, and it appears that no more is required than the consent of their governments. But what if the inhabitants of a province or of another similar administrative unit desire to be released from their present allegiance in order to join another state or to form a new one of their own, and the state to which they belong refuses to let them go? If the minimum majorities required for amendments of the constitution were

insisted upon in such a case, a large state, such as Prussia, could practically veto every suggested change. How to reconcile the conflicting claims in such an instance, proved a very thorny problem. The solution found is embodied in the provision that in the absence of the consent of the state concerned, a simple federal law is yet sufficient provided that two conditions are fulfilled, viz.:—

(1) the alteration of territory or the formation of a new state must be demanded by the inhabitants; and

(2) an overwhelming federal interest must tell in its favour.

The second question is one for the federal legislator alone to decide. But the initiative must be taken by the inhabitants of the district to be detached. Upon the demand of one-third of the electors resident therein the federal government must order a plebiscite of the whole administrative area, even if only a part of it intends to separate; and if three-fifths of the votes cast, representing at least the majority of those qualified to vote, favour the proposed change a bill embodying the decision must be introduced in the Reichstag. Cession of territory to foreign states is likewise effected by federal law, unless it is merely a question of a rectification of frontiers in uninhabited districts; to arrange for these latter lies within the powers of the executive. In any case the consent of the state or states affected has to be obtained prior to the conclusion of the treaty. (Art. 78.) To this rule there is, however, an exception: in a treaty of peace the federation may dispose of any part of the federal territory, without consulting the states to which it belongs. (Art. 45.) Foreign territories may be incorporated in the federation by means of a federal law, the desire of their population to join being a necessary condition precedent to their admission. (Art. 2.)

The size and population, nay the very life, of the territories being thus at the mercy of the federation, it is all the less surprising that there are almost no limits to the extent to which the latter may expand its own powers at their expense without amending its constitution. It was shown in the pre-

ceding chapter that there is practically no province in the legislative sphere which the federation may not arrogate to itself under the elastic terms of Article 9, as concerning either the public welfare or the maintenance of public order and security. Again, under the authority of Article 14 it may, by means of an ordinary statute, withdraw from the states and take over any branch of federal administration. And it is argued, though the weight of authority is against the claim, that the same article empowers the federation to transfer to itself the whole of the administration of justice. One distinguished writer indeed contends that inasmuch as it has concurrent power to provide for the organisation of the courts, there is no reason why it should not organise them as federal tribunals. By these provisions powers are delegated to the federal legislature to effect what in substance amounts to amendments of the constitution, with a view to enabling it steadily to pursue those ultimate aims which are clearly distinguishable in the constitution. They are in the nature of precautionary measures taken to meet the contingency that at some future date the feeling in favour of progressive centralisation might not be strong and general enough in the Reichstag to allow constitutional amendments needed to that end being carried with the requisite majorities. For there can be no doubt that the gradual approximation to, and the final realisation of, the unitarian state lie in the orthogenic line of political evolution, as drawn by the national assembly. The gradual decay of the states is helped on by the simultaneous operation of forces at the opposite pole, viz., the steady growth of local government characteristic of modern democracy. The clear recognition of the ultimate fate of the German territories if this development goes on unchecked, has tempted some authors to depress them even now to the rank of administrative divisions. But the answer must be given entirely with reference to present actualities and must not be influenced by speculations as to future possibilities.

Yet even if, without adding to its powers, the federation

were able to make full use of those which it now possesses, the states would make a far poorer show than they do. But, apart from all other obstacles, the element of time in itself stands in the way. So vast is the legislative programme mapped out for the federation that a couple of generations of hard work would barely be sufficient to carry it out. Besides, there are cogent reasons why the national state has to limit its activities in the main to the tasks which are compulsory under the constitution and cannot exercise on a liberal scale those options which it has been given to take over public business from the territories. Centrifugal forces are stronger in Germany than appears to have been realised at Weimar, and they have grown, particularly in the second largest state of the federation, since the constitution has been drafted. Recent events in Bavaria have shown that the time is not ripe for rapid centralisation, but that more than ever local susceptibilities have to be reckoned with if complications are to be avoided the issue of which no man could foresee. Moreover, financial considerations will for a long time to come limit the opportunities for extending the business of the federation. Nobody has realised this better than the federal government, which already in October, 1920, resolved as follows:—

(1) The exercise by the federation of its constitutional powers must be confined within the narrowest possible limits. Fresh tasks may be undertaken only if they impose no burdens whatever upon the federal exchequer, or if they are essential to the realisation of federal interests absolutely vital and cannot be laid on other shoulders, such as territories, communes, public or private corporations.

(2) No fresh administrative apparatus may be created, and the existing one may not be enlarged. More especially, no fresh posts may be created, no item of expenditure may be increased. Exceptions from these principles are not admissible unless it is a question of indisputably vital federal interests.

The vagaries of the German exchange have, of course, made it impossible to carry out these maxims in their literal sense; but they have been acted upon in the spirit. And on the whole, it cannot be said that the status of the German territories has so far been materially lowered by the greater centralisation of government functions. Indeed, it seems that the disappearance of their princes and of the splendour of their local courts has detracted more from their prestige than the transfer of powers to the federal government.

In one important respect, however, the states have suffered seriously; their financial independence is gone. In imperial times the federal revenue was largely derived from the contributions of the states. Now the huge requirements of the federation, seven or eight times as large as those of the territories, in particular the necessity of finding money for the payment of reparations, have forced it, not only to make full use of the rights conferred upon it by the constitution, but to enlarge them considerably by subsequent legislation. Under the federal statute on state taxes of 30th March, 1920, both the territories and the communes have to live almost entirely on doles, viz., on the shares assigned to them in certain federal taxes, such as the income tax, corporation tax, death duties, and the autonomy of the states is further encroached upon by the provision that the local authorities must introduce certain forms of taxation. As in financial legislation, so it is in financial administration. Instead of the states managing the federal taxes other than customs and excise, as was intended by the constitution, all federal taxes are now collected by federal authorities, and it is made optional for the states to transfer to these the administration of their taxes and their property. (Federal law of 13th December, 1919, on the regulation of federal taxes, par. 19.)

An instance has just been given of an encroachment of the federation on the autonomy of the territories. Some writers who maintain that the latter have lost all claim to be regarded as states, base their contention upon the intrusions of the fede-

ration on the intimate life of the states rather than on the curtailment of their powers. Article 15, which deprives them of the right of self-determination in constitutional matters, is looked upon by them as conclusive. It prescribes—

(1) that every state must have a republican constitution;
(2) that every state must have responsible government;
(3) that the Reichstag franchise must be adopted for both state and communal elections.

Now the first requirement has its parallel in the American constitution, according to which "the United States shall guarantee to every State in this Union a republican form of government" (Art. IV. 4), no less than in that of the Swiss federation. (Art. 6.) Again, as is shown by the XVth Amendment of the constitution, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, colour, or previous servitude," in America too the states have to submit to directions of the federation as to the qualification of voters, though here the interference may be justified on the special ground that the franchise in the states carries the right to vote for members of Congress. It is true, the Weimar constitution goes much farther. *E.g.*, it extends the parliamentary privileges and immunities of members of the Reichstag to those of the state diets (Arts. 38 and 39); it makes it compulsory for the states to establish administrative tribunals (Art. 107); it confers on the federal legislature power to regulate the status of the officials of all public corporations (Art. 10) and in the immediate exercise of that power accords certain privileges to federal, state, and municipal officials indiscriminately (Arts. 128-130). But after all, the differences, though considerable, cannot be regarded as fundamental. The most serious feature is that the German constitution does not respect the integrity of the states, but cuts into their flesh and lays hold of municipalities and communes. But even in this treatment, as will presently be seen, Germany does not stand alone.

It is provided in Article 17 that in every state "the representatives of the people must be elected by the universal, equal, direct and secret suffrage of all German subjects, men and women." The stress for present purposes lies on the word "German." The franchise is not the exclusive privilege of the citizens of the state, but is enjoyed by every German national resident therein. The same rule applies to communal elections, subject to the proviso that "the right of voting thereat may be made, by a state law, to depend upon a residential qualification of not more than a year." These prescriptions are but the application to a special case of the broad principle, enunciated in Article 110, that "every German has in every German state the same rights and duties as the subjects of the state themselves." This principle, it is said, makes membership of a state meaningless, reduces state citizenship to an empty shell, and is the final proof that the German territories have nothing in common with what might by a stretch of the imagination be called a state. But does the German constitution really differ much in this respect from that of the Swiss federation, Article 43 of which enacts that "every domiciled Swiss citizen enjoys at his place of residence all the rights of a citizen of the canton and, together with these, all the rights of a member of the commune," and again, "in cantonal and communal affairs he acquires the right to vote after three months' residence"? And an American citizen acquires, not only the rights of a citizen, but the actual citizenship, of a state by settling in it; for section 1 of the XIVth Amendment runs: "All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

A detailed examination of the arguments advanced in support of the view that the German territories no longer deserve to be called states, and of the facts adduced in proof of that contention, has shown that the thesis is untenable. If the term "state" is used in that limited, and purely political,

sense of which alone it is capable when applied to the units of a federation, there is no reason why it should not be applied to those of the German republic. It is true, almost all along the line they are depressed below the level of the states of the American Union and that of the Swiss cantons. This indeed was unavoidable. For, as was remarked before, progressive centralisation is the regular, and appears to be an almost necessary, attribute of any federal state that is at all viable, and the Weimar construction is the latest and most modern pattern of a federal constitution. But if the picture of the German territories is studied with a mind kept clear of all anticipations of what they will look like when they shall have reached a ripe old age, it becomes apparent that though their features are a little blurred, they undoubtedly belong to the same family as the units of other federal states.

On the other hand, it is submitted, the German states still differ *toto cœlo* from mere administrative areas of a decentralised unitarian state, and mainly for the following reasons:—

(1) They have territories of their own. "The federal territory consists of the territories of the German states." (Art. 2.) That is to say, the territory is primarily theirs, and only in a derivative way German federal territory. England and Prussia do not consist of counties and provinces respectively; counties and provinces are divisions of the state, *i.e.*, secondary formations. Besides, the extreme inequality in size of the German territories seems in itself to negative the suggestion of an analogy with administrative districts.

(2) They have subjects of their own. Again, membership of a state is primary, German nationality is secondary and derivative. It is true, the federal legislature alone has now power to lay down the conditions of citizenship (Art. 6), citizenship here meaning membership of the states as well as of the federation; and the states are no longer free to vary the terms of admission to, or loss of, their citizenship. But the fact remains that you cannot be or become a German unless

you are or become a Prussian, a Bavarian, etc., and that by ceasing to be a member of a territory, a man loses his German nationality. It is obvious that to be a Saxon has a political significance, which to be a Yorkshireman, a Brandenburger has not. In Switzerland similar rules prevail. (Art. 43.) In this respect then the German territories and the Swiss cantons partake much more strongly of the nature of true states than do the states of the American Union, where citizenship is primarily national, though in conferring it the Union utilises the administrative machinery of the states, whilst state citizenship is only an incident of residence.

(3) The territories with their republican constitutions, responsible government, and local diets, the members of which enjoy parliamentary immunities, are organised after the model of states. In fact, the prescriptions of Article 17 of the federal constitution render such organisation compulsory and impliedly forbid them to adopt a local government polity no less than a monarchical or a Soviet constitution.

(4) Whilst, on a proper juridical interpretation of the constitution, the powers exercised in legislation and administration by the German territories are derived from the central government quite as much as those of a provincial administration, the form and nature of the delegation is utterly different in the two instances. The assignment of functions to local government organs is always detailed and piecemeal; the powers conferred are carefully circumscribed by statute and are to be strictly construed, so that chapter and verse has to be given for the exercise of every authority claimed. The delegation of powers to the German states is *en masse*. Indeed, there is a presumption of authority in their favour in both legislation and administration, so that they are free to do anything not expressly forbidden by the federal constitution or by federal law. It is unthinkable that any state, however decentralised, should give such *carte blanche* to local authorities.

(5) What, however, perhaps more than anything else brings

out the sharp contrast between the German states and local government areas, is the fact that the former still retain, under the Weimar constitution, the lion's share in the administration of justice. To confer civil and criminal jurisdiction upon organs of provincial administration would mean to revert to feudal ideas of the middle ages, a retrograde step which no modern state would take, least of all Germany, who did not succeed, till a comparatively late date, in ridding herself of those archaic institutions, the local courts.

To sum up, while it cannot be denied that the future evolution of the German republic, as foreshadowed in the constitution, tends towards the realisation of the unitarian state, this stage has not been reached yet and is not even in sight. Nor are there valid reasons for the claim that it is a composite state of quite unique a kind—as has been said, a "*res sui generis*," except, of course, in so far as every state, like every human being, exhibits individual traits. If the motto of the American Union, "*e pluribus unum*," is true of every federal state, the German republic has advanced somewhat farther in the direction of that unity, but the conclusion arrived at in the report of the Committee on the Constitution is fully justified: "There can be no doubt about it, the new German national state is a federation too."

CHAPTER IV.

THE REICHSTAG.

The German legislature consists of one single house, the Reichstag. "Federal laws are enacted by the Reichstag." (Art. 68.) The Reichsrat (Federal Council), as will be shown later, though discharging some of the functions which elsewhere belong to a second chamber, and though sometimes described as such by foreign writers, is not in any true sense a House of Parliament. But just because it provides to a certain extent a substitute for a revising chamber, does the unicameral system work well in Germany and is free there from the defects generally associated with it. Nor are other checks wanting against hasty and ill-considered legislation. The somewhat aphoristic statement in Article 68 must therefore be taken subject to certain qualifications and limitations, which will be fully explained in a subsequent chapter. Yet it remains substantially true that the command which according to Austinian teaching is the essence of the law, issues normally from the Reichstag. The Reichstag is not indeed a sovereign legislature. For under the German constitution not only political, but legal, sovereignty resides in the people: "Supreme power emanates from the people." (Art. 1.) But the sovereign lies generally dormant and is difficult to rouse into activity, and the Reichstag, composed as it is of the representatives of the people, is the main repository of delegated authority and the organ through which it is chiefly exercised. Hence it is only in accordance with the fitness of things that the Reichstag is accorded the place of honour in the constitution itself.

It is not, then, surprising that the constitution has been lavish in the functions assigned to it, and which extend far

beyond the field of legislation, though the latter itself is of wide dimensions in Germany. For it includes, on the one hand, amendments of the constitution—"The constitution can be amended in legislative forms" (Art. 76)—constituent assemblies or conventions being unknown to it, and, on the other, not a few acts in their true nature executive, for which the form of laws is nevertheless prescribed. In requiring "the budget to be settled by law before the beginning of the financial year" (Art. 85), the German constitution merely adopts the practice universal in modern states. Nor does it leave the trodden path when enacting that "a federal law alone can authorise a raising of moneys upon credit, or the assumption, by the Federation, of liability by way of guarantee." (Art. 87.) Again, foreign precedents can be found, in the French constitution for instance, for the provision that "federal amnesties require a federal law." (Art. 49.) But the clause in Article 45, "Declaration of war and conclusion of peace are effected by federal law," is undoubtedly an indigenous growth on German soil. An Act of Parliament is indeed required in most countries outside the United States for the ratification of peace treaties; but how the actual conclusion of peace, an international act, is to be effected by municipal legislation, is not easy to comprehend. Again, that the consent of Parliament is necessary to a declaration of war, is generally expressly laid down in the constitution, and where not, it is yet rendered indispensable by the financial exigencies of the situation. Under the American constitution it is the Congress that actually declares war. But that a measure which by its very nature exacts promptness of decision and brooks no delay, should have to pass through the cumbrous law-making machinery, particularly in a state in which the referendum may form part of the process, does not seem practical politics—and, perhaps, was never intended to be so. For the fathers of the constitution in their unbounded pacifism appear to have refused to contemplate anything beyond national defence and may well have desired to render an act of

aggression extremely difficult, if not quite impossible. Among other acts for which a federal law is required may be mentioned alterations of the federal frontiers, not being mere rectifications in uninhabited districts (Art. 78), territorial changes within the Federation (Art. 18), and the appointment of a presidential deputy in case of prolonged disability. (Art. 51.) The consent of the Reichstag, not in the form of law, and therefore uncontrolled by other agencies, is necessary for the validity of treaties of alliance and of such other treaties as affect topics of federal legislation. (Art. 45.) A resolution of the Reichstag is sufficient to force the President of the Federation to repeal the proclamation of a state of siege or to withdraw such measures as he may have taken to compel a recalcitrant state to perform its duties to the Federation. (Art. 48.) The Federal Chancellor of the Exchequer is bound to account to it annually for the application of the federal revenue. (Art. 86.) "Criminal proceedings may not be instituted against the President of the Federation without the consent of the Reichstag" (Art. 43), while the Reichstag itself may propose to the people his removal from office (*ibidem*) or may impeach him, the Chancellor, or any Federal Minister (Art. 59).

The list just given does not, however, exhaust the activities of that august assembly. For the Reichstag is clothed with authority to exercise all federal powers not expressly conferred on another person, or body of persons. This "presumptive competence of Parliament" does not rest in Germany, as it does, *e.g.*, in Switzerland, upon an express provision of the constitution, but there follows as a corollary from the position of the Reichstag as the direct representative of the sovereign people. And last not least, the whole of the administration is carried on subject to its constant supervision and control; for the government is based on the principle of parliamentary responsibility, not by a mere convention of the constitution, but by express enactment. (Art. 54.)

To enable the House to gain the necessary information and to call the government to account, it is provided in Article 33 that "the Reichstag and its Committees may demand the presence of the Federal Chancellor and of every Federal Minister." The Article proceeds to confer a privilege corresponding to this duty upon the members of the government, who are not necessarily members of the Reichstag: "The Federal Chancellor, the Federal Ministers and Commissioners appointed by them have access to the sittings of the Reichstag and of its Committees." This clause closely imitates a French pattern, with this difference, however, that in the latter the Commissioners are appointed by presidential decree and for participation in the debate on a single bill only. The right of the members of the government to be heard independently of the Orders of the Day, and even after the debate on a subject has been closed, which in France rests on the Standing Orders of the two chambers, is in Germany conferred by the constitution itself. The Reichstag, jealous of its privileges and anxious to secure to its own members the last word, has provided by Standing Order that the exercise, by a member of the Federal Government, of the right to speak after the debate has been closed re-opens the debate. A similar, though somewhat narrower right is enjoyed by the plenipotentiaries of the states, who may attend the sittings "for the purpose of explaining the standpoint of their government in respect of the subject under discussion." Again, "the Federal Economic Council may delegate one of its members to appear before the Reichstag in support of a bill" (Art. 165) proposed by it. Strangely enough, no similar privilege has been conferred on the Reichsrat.

"The Reichstag is composed of the representatives of the German people" (Art. 20), *i.e.*, of the German people as an undivided whole. The German constitution consistently carries out the principle common to all federal states that in the popular chamber at any rate representation is on a national basis, whilst the Swiss Federal Constitution, and even

more so that of the United States, exhibit features by which that principle is obscured. Thus:—

(1) In the mapping out of German electoral areas state boundaries are entirely ignored, while in America and Switzerland elections are by states and cantons respectively, and each state or canton, regardless of population, is entitled to one member at least.

(2) The Reichstag franchise is determined by federal law and is uniform for the whole of the Federation. The United States' constitution, on the other hand, is content to adopt the electoral qualifications for the lower houses of the state legislatures as the franchise for the federal House of Representatives, subject to this limitation only, prescribed by Amendment XIV., that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, colour, or previous servitude."

Not only the Reichstag in its corporate character, but each member thereof represents the whole of the people. "The deputies are representatives of the whole people. They are subject to their conscience alone and are not bound by instructions." (Art. 21.) This text was first enunciated by Siéyès in the *Assemblée nationale* of 1789 and has since passed from constitution to constitution, without however acquiring a very definite practical meaning in its peregrinations. It is unassailable indeed either as a constitutional doctrine or as an ethical maxim, signifying that the relationship in which a deputy stands to his constituents is not that of agent and principal, that his authority is not derived from them, but conferred by law, and that he is, and ought always to remember to act as, the representative of the people, and not of a section thereof. Legally it has a merely negative content, implying, what is laid down explicitly in Article 36, that a member cannot be called to account outside the House for anything said or done in the discharge of his parliamentary functions. But if a member of the Reichstag escapes political

responsibility to his constituency and the sanction of not being returned again, he owes this immunity, not to the operation of the clause under consideration, but to the peculiarities of the German electoral system, under which the local electorate has but a minor voice in the choice of candidates. The conscience to which alone deputies are said to be subject is in practice their party. For in Germany loyalty to party is almost stronger than allegiance to the state, and party discipline is so stringent that there is no room for independent judgment, and that no one has a chance of being even nominated for a seat unless he is known as a good and reliable party man. It is true, the German National Assembly did not possess the courage to break away from the tradition according to which the word "party" must not be mentioned in the polite society of constitution-makers, and only in a remote corner of its work is there a reference to party, and then as to something unclean, viz., in Article 130, where it is laid down that "officials are servants of the community, and not of a party." Yet if parliamentary government in itself means party government, in Germany more than elsewhere does party form the pivot on which the whole of the constitution turns, since the electoral system presupposes it and would be quite unworkable without it. The Standing Orders of the Reichstag, which are conceived in a less prudish spirit, not only take notice of the existence of political parties, but accord them official recognition under the style of "parliamentary fractions," and endow them with certain privileges, provided that they can muster fifteen members.

"The representatives are elected by the universal, equal, direct and secret suffrage of all men and women over twenty years of age in accordance with the principle of proportional representation. Election day must be a Sunday or a public holiday." (Art. 22.) The German parliamentary franchise has justly been described as the most democratic to be found in any state. In so liberal a spirit has the Constitution conceived it as not even to exact German nationality as a con-

dition of its exercise, whilst requiring it for the vote at presidential elections. (Art. 41.) The omission seems to have been due to an oversight and has been made good by paragraph 1 of the law concerning elections. What is a real anomaly is that the vote is given to minors, that persons in the eyes of the law, on the ground of non-age, incapable of looking after their own affairs should be credited with a mind mature enough to judge rationally on public matters. A somewhat ingenious justification, on democratic principles, has been found for this provision, which is borrowed from the Swiss constitutional code. Since the average duration of life is less among the working population than among the higher and middle classes, the natural advantage which the latter possess is to some extent minimised if the age qualifying for the vote is chosen low. Neither the receipt of poor-law relief nor bankruptcy is any longer a disqualification. The only persons really disqualified are interdicted prodigals, certified lunatics, and convicts. Inmates of institutions for mental disorders or for the feeble-minded, those in safe custody, and those serving sentences for minor crimes, other than political offences, are euphemistically described as being "prevented" from exercising their right to vote, which in the case of members of the defence force is said to be "dormant." Now since the statute above referred to lays down that any person who has the right to vote is eligible for a seat in the Reichstag, provided that he or she has attained the age of twenty-five and has been of German nationality for not less than a year, it follows that an imbecile, a misdemeanant, and a soldier, whilst not allowed to vote, may be elected and sit. No public office other than that of President of the Federation (Art. 44) is incompatible with membership of the House; nor does a member vacate his seat by accepting public office.

The mode of election "in accordance with the principle of proportional representation" is regulated in detail by the federal law concerning elections of 27th April, 1920. Now the idea underlying proportional representation is the postulate that the House, in order to be truly representative, must be

an exact replica, on a minor scale, of the political configuration of the nation. This aim can be attained only by distributing the seats among the parties in exact proportion to their voting strength. The statute therefore adopts what has been variously described as the "fixed or immovable quota" or as the "automatic" system. The number of seats to be filled is not predetermined, the statute merely enacting that a seat shall be allocated for every 60,000 votes cast, so that the membership varies with each Parliament according to the zeal displayed by the electors. The country is divided into thirty-five large electoral districts, and voting is by lists. The lists are "strictly binding," *i.e.*, the voter can neither add nor delete a name nor indicate his order of preference, but has to accept the list as it stands; in other words, he votes for his party, and not for the candidate of his choice. The number of seats which each party has secured in a district is ascertained by dividing its total vote by 60,000. There remain the surplus votes to be dealt with, *i.e.*, votes insufficient in number for a seat or for a further seat. For this purpose neighbouring electoral districts have been combined into unions, seventeen in all, and it is optional with the parties to combine their district lists into union lists. If they avail themselves of this privilege the surplus votes of all the districts belonging to the same union are added up and allocated to the union list. The surplus votes of the unions, together with those of districts in which a party has refrained from joining the union, are carried to a central party list for the whole of the Federation, so that in the end comparatively few votes remain ineffective. The federal lists are made to serve a further purpose, viz., to secure the return of eminent party leaders, without compelling them to engage in local contests. The question may be asked whether it was really necessary to erect all this complicated machinery and whether the same result could not have been obtained by the simple and obvious device of constituting the whole federal territory as a single electoral area and allotting the total vote of each party to its one central list. If the

makers of the constitution did not take this last and decisive step the reason was that they did not wish to destroy the last vestige, or rather the fiction, of a personal bond between the electors and the elected. Whether this absence of local colour in the representatives is not an advantage rather than a drawback may be left an open question. What is undoubtedly a defect in the German scheme is that it renders by-elections impossible. It must, however, be admitted that the want of such a barometer for rapidly recording changes in the political atmospheric pressure is not of paramount importance under the multiparty system, as prevailing in Germany, where government is necessarily by coalition, and where a shifting of the political centre of gravity shows in the Reichstag much earlier than it does in the country. Elections are held on a day appointed by the President of the Federation, which must be a Sunday or a public holiday (Art. 22), and not later than the sixteenth day after the dissolution of Parliament either by presidential decree (Art. 25) or by efflux of time (Art. 23). The duration of the House is limited to four years (*ibid.*), its age being reckoned from election day, and not, as in England, from its first meeting. Only one general election has been held under the scheme just explained, viz., on 6th June, 1920, when 469 members were returned, the seats being divided between the principal political parties as follows:—

Majority (constitutional) socialists	108
Independent (revolutionary) socialists	61
Communists	25
Centre party (Roman Catholic)	72
Bavarian popular party (affiliated with the Centre party)	20
German democratic party (radical)	40
German popular party (moderately conservative, in principle monarchical)	65
German national popular party (reactionary, uncompromisingly monarchist, the "Junker" party)	71

The seven remaining members represent two small parties

with a local following only, viz., the German Hanoverian and the Bavarian peasants' party.

Since each of these 469 deputies was returned by 60,000 votes, it follows that more than twenty-eight millions of votes must have been cast out of a possible total of about thirty-five millions. That 60 per cent. of the whole of the population should have the franchise, and that over 80 per cent. of those qualified should actually vote, are facts equally striking. The membership of the House is, however, considered to be too large for the prompt despatch of business, and a movement is on foot in Germany to reduce it by raising the electoral quota.

"The sittings of the Reichstag are public. The public may be excluded on the motion of fifty members carried by a two-thirds' majority." (Art. 29.) The motion is not put to the vote without debate, as in this country, but, according to the Standing Orders, after debate with closed doors. In fact, the right to exclude strangers is not in Germany, as it is in England, a parliamentary privilege and therefore left to the unfettered discretion of the House itself. German constitutional theory has adopted the French doctrine, according to which the publicity of parliamentary proceedings is a democratic postulate, an interest of the nation, and therefore to be curtailed only in circumstances and under safeguards defined by the Constitution itself. Under the Imperial Constitution no vote was valid unless at the time when it was taken a majority of the full membership was present. With a provision so stringent the absence of a quorum was the rule rather than the exception, and obstructionist tactics were given free play. The new Constitution (Art. 32) therefore wisely left it to the Standing Orders to fix a quorum. Strange to say, the latter reproduce the old constitutional rule, though, now as before, a sufficient number of members is presumed to be present, just as in the English Commons, unless and until the House is formally counted out. No quorum is prescribed for mere debates. "For a resolution of the Reichstag a simple majority is required where no other majority is prescribed by the

Constitution." (Art. 32.) The following are the exceptional cases here referred to:—

I. A two-thirds' majority is required—

(1) to exclude strangers (Art. 29);

(2) to carry a recommendation to the people that the President of the Federation be removed from office (Art. 43);

(3) to pass a bill against the protest of the Reichsrat. (Art. 74.)

II. A two-thirds' majority in the presence of two-thirds of all the members is prescribed for—

(1) amendments of the Constitution (Art. 76);

(2) impeachments. (Art. 59.)

III. There are two cases in which the minority can impose its will upon the majority, viz.:—

(1) A Committee of Enquiry must be appointed upon the motion of one-fifth of the members. (Art. 34.)

(2) One-third of the members may require the President of the Federation to postpone the promulgation of a law for two months. (Art. 72.)

The procedure of the Reichstag, as regulated in its Standing Orders, on the whole corresponds closely with the practice of foreign parliaments. Perhaps the only peculiarity worth mentioning is the method or rather methods of voting, of which there are three:—

(1) The rough and ready plan usually adopted is for the Ayes to rise and to be counted. If the test seems inconclusive, as may well happen, since those who wish to abstain from voting, of course remain seated as well as the Nays, the latter are asked to stand up.

(2) If the result is still left in doubt, "the sheep are made to jump," to use the German parliamentary slang expression by which a proceeding analogous to an English division is known. The secretaries of the Reichstag act as tellers.

(3) Upon the motion of fifty members a card-vote is taken,

in which case alone the division lists are entered on the parliamentary records. This mode of voting has a tragic by-effect: the members absent are "spied" and lose a day's pay.

The officers of the Reichstag are the President, Vice-Presidents and Secretaries (Art. 26), elected at the beginning of each session. "Between two sessions or two elective periods the President and Vice-Presidents of the last session continue to perform the duties of their respective offices." (Art. 27.) The following two results may be deduced from this clause:—

(1) During the interval between dissolution and general election they act, not as officers of the Reichstag—for no Reichstag is then in being—but in virtue of an authority conferred by the Constitution itself.

(2) They continue to exercise their functions up to the first meeting of the new House, even if they have meanwhile lost their seats.

The following are the chief duties of the President of the Reichstag:—

(1) He presides over its meetings, directs its business in accordance with the Standing Orders and maintains discipline, to which not only the members, but, under a special provision (Art. 33) of the Constitution, the representatives of the federal government and the plenipotentiaries of the states are likewise subject.

(2) He "exercises domestic authority and police powers in the Reichstag building." (Art. 28.) These two functions are entirely different in character and in scope. The former is merely the ordinary right of a householder to be master in his own house and to exclude trespassers. This right is further sanctioned by a statutory provision (law of 8th May, 1920), which threatens with fine and imprisonment any one who intentionally enters or remains in the Reichstag building in violation of the rules and regulations made by its president. The exercise of police power by him, on the other hand, is a parliamentary privilege and will, as such, be discussed later.

(3) "The administration of the house is in his charge; he

regulates the receipts and expenditure of the house in conformity with the budgetary provisions and represents the Federation in all transactions and in all legal disputes that fall within the sphere of his administration." (Art. 28.) Since the Reichstag is not legally a corporation, it cannot hold property, contract, sue, or be sued. All the rights and obligations in question are vested in the federal treasury, which for all purposes of the administration of the Reichstag is now represented by its president, and not, as under the old constitution, by the Home Secretary.

(4) In certain circumstances he summons the Reichstag.

The Constitution empowers the Reichstag to appoint Committees of Enquiry and provides for two Standing Committees. All these committees are given very wide powers. They may compel the attendance of witnesses and examine them upon oath, or they may call upon the courts and the administrative authorities to collect evidence for them. All official documents must be produced upon their demand. The privacy of correspondence and the secrecy of the postal, telegraphic and telephonic services alone are to be respected by them. The Standing Orders of the Reichstag provide that the seats on the committees are to be divided among the parliamentary fractions in proportion to their numerical strength:—

(1) Committees of Enquiry (Art. 34) may be appointed at any time and must be appointed upon the motion of one-fifth of the members. They sit in public and take such evidence as either they or the proposers consider necessary. But strangers (not other members of the Reichstag who do not happen to sit on the Committee) may be excluded by resolution carried with a two-thirds' majority. Their primary object is to procure at first hand the information necessary for effective criticism of the administration. They are a powerful means for the protection of the rights of minorities. Since the proposers are able to determine both the scope of the enquiry and the evidence to be collected, even an opposition small in numbers can bring to light facts which it may be in

the interest of the government and their supporters to conceal, the publicity of the meetings being a further safeguard in the same direction. Another useful function which these Committees fulfil is the collection of materials required for the preparation of bills at the initiative of the House. They may continue to sit after a prorogation, but, of course, come to an end with the dissolution of Parliament.

(2) The Committee on Foreign Affairs (Art. 35) may with literal truth be described as permanent since it outlives, not only the session, but Parliament itself and continues its activities until the first meeting of the newly-elected Reichstag. Secret sittings are the rule, but the public may be admitted if the Committee so decides with a two-thirds' majority. In making the appointment of this Committee compulsory the avowed aim was to put an end to secret diplomacy.

(3) A Standing Committee is appointed "for the protection of the rights of the representatives of the people as against the Federal Government" between sessions and between two Parliaments. (Art. 35.) In other words, this Committee comes to life only when the Reichstag is either dormant or non-existent.

Whilst the Committees of Enquiry were borrowed from England, and the Committee for Foreign Affairs is fashioned on the French model, the Watch and Ward Committee is a purely German invention and therefore the best index to the true motives underlying the German constitutional conception of all of them. Reminiscences of the Empire with its unreconciled dualism of administration and legislation were all too vivid in the minds of the constitution-builders. To them government was still an evil spirit to be laid, a wild beast to be chained at all costs. Distrust of the executive was then the root from which the whole committee system sprang, and Committees were appointed in season and out of season to ensure that the administration was carried on in conformity with the wishes of the representatives of the people. Slowly

and gradually, however, it dawned upon the Reichstag that under the parliamentary system the government was bone of its bone and flesh of its flesh, and all those measures of control and supervision now came to be looked upon as not only unnecessary, but as positively mischievous. But what were they to do with the Committees? There they were, and some other justification had to be found for their existence. Henceforth they were regarded as suitable training grounds for budding statesmen and as means of preventing narrow cliques of professional politicians from acquiring a monopoly of experience in public affairs. Therein they certainly serve a useful purpose, especially with a people uneducated in the art of national self-government. But though the fear of every kind of executive on which the German committee system must be fathered, was undoubtedly irrational and excessive, it may be questioned whether the reaction against that range of ideas has not gone too far now. For after all responsible government means government by a majority, and it has yet to be shown that committees on the German model do not to a certain extent supply correctives against the evils and abuses of majority rule. The Reichstag is, of course, at liberty to appoint other committees, but none of these could exercise the special powers conferred by the Constitution on those above-named. The Standing Orders of the House provide for tho following six additional Standing Committees: the Committee on Rules, the Committee on Petitions, the Economic Committee, the Finance Committee, the Committee on Justice, and the Committee on the Budget.

Before proceeding to the discussion of Parliamentary Privileges mention must be made of one now extinct. Under the Imperial Constitution the Reichstag had been the sole judge of the elections, returns and qualifications of its members. The defects inherent in this system, political partisanship and interminable delays, had long been conspicuous. The jurisdiction was therefore transferred to a Court *ad hoc* created "in connection with the Reichstag." (Art. 31.) The words be-

tween inverted commas are ominous. The connection with the Reichstag is in fact but too intimate. For the tribunal in question is a mixed one, its benches being composed of three Members of Parliament and of two judges of the Federal Administrative Court. It is a German illusion that in order to secure judicial impartiality nothing more is required than that a body be called a Court and that it adopt some quasi-judicial forms of procedure.

In monarchical states it is the prerogative of the Crown to summon, to prorogue, and to dissolve Parliament. So in the United Kingdom, in Italy, in Spain. Modern democratic doctrine, on the other hand, has discovered the inconsistency involved in allowing the meetings of the legislature, the main repository of popular sovereignty, to depend upon the will of any other power in the state and has secured the recognition of the so-called right of self-assembling, which was first asserted in the "Agreement of the People," not only in parliamentary, but also in presidential and even in most crowned, republics. In new Germany this privilege is even more jealously guarded than elsewhere. Since the practice, now universally obtaining, of passing the budget for one year only, necessitates annual sessions, a fixed day is usually appointed by modern constitutions on which Parliament assembles automatically. Now since France had settled on a Tuesday in January and the United States on a Monday in December, what other date could the third great republic choose for the opening of the session than a Wednesday in November? The first Wednesday in that month is accordingly appointed (Art. 24), subject however to the right of the Reichstag at the close of each session to decide when the House is to meet again (*ibidem*), *i.e.*, to antedate the opening of the session. The Constitution further lays down that a newly elected Reichstag "assembles for the first time not later than on the thirteenth day after its election" (Art. 23); that is to say, it meets on that day unless previously convened by the last president of its predecessor (Art. 27). Whilst even the most democratic con-

stitutions generally clothe the head of the state with authority on extraordinary occasions to summon Parliament, this right is, formally at any rate, denied to the President of the German Federation. It is only the summons of its own president that the Reichstag obeys, though he is bound to convene it upon the demand of either the President of the Federation or of at least one-third of its members. (Art. 24.) Again, both adjournment and prorogation are left entirely to the decision of the House (Art. 24); the President of the Federation can decree or influence neither. But he "may dissolve the Reichstag, but only once for any one cause." (Art. 25.) For once the German constitution falls short of the democratic ideal, according to which Parliament has no master, when it confers upon the President a power denied to him both in the United States' Constitution and in French constitutional practice. But it was justly felt that while such a right could well be dispensed with in the case of a chamber as short-lived as the American House of Representatives, the conventional non-user by the French President of his constitutional right was an unmixed evil. The German National Assembly showed all the less reluctance to investing the President with that authority since its exercise is limited by the requirement of ministerial counter-signature, which, as the measure is invariably prompted by questions of general policy, and not of departmental detail, must always be that of the Federal Chancellor. Finally, it must not be forgotten that under the German constitution the representation of the people never ceases entirely, the Watch and Ward Committee being charmed into life as soon as Parliament expires. As the day of the general elections is the official birthday of the Reichstag, it follows that it can be dissolved before it has ever met. It is otherwise in countries where Parliament, till it first assembles, is looked upon as having merely a potential, not yet an actual, existence. It will be remembered that an attempt to act in violation of this constitutional doctrine, now well established in Belgium and France, cost King Charles X. his throne. The restriction

which the German Constitution seeks to impose upon the president's right by forbidding him to exercise it more than once for any one cause, cannot well be effective in practice. For he is not bound to assign any reason. And who, in the case of repeated dissolutions, is to judge of the motive in each instance? Even assuming that his delinquency under this heading were proved and he became liable to impeachment for a culpable violation of the Federal Constitution (Art. 59), it does not by any means follow that the decree dissolving the Reichstag for the second time is a mere nullity, which the Reichstag to be dissolved may disregard. A dissolution of the chamber by the vote of the people, peculiar to the German constitution, remains to be noted: it results automatically from the refusal of the electorate to sanction a motion of the Reichstag that the President of the Federation be removed from office. (Art. 43.)

In virtue of its right of self-organisation (Art. 26) the Reichstag elects its officers, regulates its procedure by Standing Orders, and therein confers upon its president such disciplinary powers as appear necessary for the orderly conduct of its business and for the preservation of parliamentary decorum. The privilege of providing for the maintenance of discipline is not expressly conferred, but is impliedly recognised in Article 33, according to which the representatives of the Federal Government and the plenipotentiaries of the states are subject to it.

Immunity from the local authorities has been conferred upon the Reichstag building, in imitation of the French practice followed ever since 1789, when the postulate was first formulated "que la police de la salle où l'Assemblée se réunit ne peut appartenir qu'à l'assemblée elle-même." The recognition of such privilege appears indispensable in a Federal State which has no territory of its own, such as the District of Columbia, and has not even resorted to the expedient employed by the Swiss, who, when confronted with difficulties and inconveniences flowing from the same cause, conferred full

extra-territoriality on both Chambers, on the members of the Federal Government, and on all federal buildings, to exempt them from cantonal jurisdiction. As it is, the privilege, as recognised in Germany, is very narrow in scope. It means no more than that the House itself, acting through its president, takes the measures necessary for the preservation of public order and security within its precincts (Art. 28), and that no search or seizure of papers is permitted within its walls without the consent of the President of the Reichstag (Art. 38). The German Parliament has no power to commit or otherwise inflict punishment, nor can it enforce its decisions by warrants to be executed outside the house. It has not even an executive officer of its own, such as the English Sergeant-at-Arms, and its Speaker has no other means to execute his orders than by calling in the local police. The Reichstag building enjoys special statutory protection under a federal law of 8th May, 1920, which, similar in tenour to 57 Geo. 3, c. 19, s. 23, prohibits open air meetings and public processions within a mile of its gates.

While the privileges hitherto discussed are on the face of them rights of Parliament in its corporate capacity, those now to be considered seem at first sight intended to afford a personal protection to the individual member. In truth, however, they are privileges of the House no less than those of the former class, and are conferred, like these, with the sole object of enabling the representative body to discharge its functions with perfect freedom from external influence and interference. The individual deputy basks only in the reflected glory that shines forth from the House, and he cannot therefore waive their benefit.

"No proceedings, legal or disciplinary, may be instituted at any time against any member of the Reichstag . . . for the way in which he has voted nor for any utterance made in the exercise of his parliamentary functions nor may he otherwise be called to account anywhere outside the House."

(Art. 36.) The privilege is enjoyed by members of the Reichstag only, and is not shared by the members of the Federal Government, the Federal Commissioners, or the Plenipotentiaries of the States unless they happen to hold a parliamentary mandate at the same time. Again, the privilege is a bar to proceedings only, but does not divest an utterance of its otherwise wrongful character. So a defamatory statement in the Chamber may be relied upon by way of defence or may be pleaded in mitigation of damages or punishment in an action or prosecution founded on a libellous counter-attack made outside the House.

Closely connected with freedom of speech is the immunity of parliamentary reports. With the English House of Commons the tendency has been to prevent rather than to favour their publication, and unauthorised publication was long treated as a breach of privilege. Even now such reports are made and published on sufferance. If at law they enjoy a qualified immunity, this is the fruit of victory of the freedom of the press in its struggle with parliamentary opposition. Indeed, apart from statutory protection, publication of its own proceedings by, or by the authority of, either House of Parliament, unless confined to its own members, receives no more favourable treatment in the Courts. Continental constitutional practice, on the other hand, places parliamentary reports under the protecting ægis of parliamentary privilege, though different reasons are assigned for it in different countries. Nor is the distinction a merely theoretical one, but certain practical consequences are deducible from it. In Belgium, and in the main in France too, it is held to follow, as a necessary corollary, from the principle of freedom of speech. The German Constitution provides in Article 30 that "Accurate reports of the proceedings in public sittings of the Reichstag or of its Committees are absolutely privileged," and since it is laid down in the preceding article that the sittings of the Reichstag are public unless strangers are excluded by the vote of two-thirds of the members present,

it discloses by the sequence of topics, no less than by the actual wording, the exact ground on which the immunity of parliamentary reports is based, viz., the publicity of the parliamentary proceedings themselves. In fact, the press is regarded as a mere extension of the public galleries of the Reichstag. The following points deserve attention:—

(1) The privilege is co-extensive in Germany with the publicity of the debates. It does not cover reports of what has happened behind closed doors, but includes the proceedings of Committees as well as those of the whole House. In France it is restricted to plenary sittings.

(2) Only reports are protected, but neither criticisms nor comments founded on them. In this Germany merely follows the practice prevailing in all other countries.

(3) It must be a report of "proceedings"—not necessarily of the whole of the proceedings of the day, but at least of so much of them as forms an integral whole, *e.g.*, the debate on a certain motion. A report of a single speech would not be protected, whilst in France the right of a deputy to print and to distribute broadcast any speech which he has made in the Chamber, is not only held to be implied in his right of freedom of speech, but is expressly recognised in the Standing Orders.

(4) In certain respects the immunity of parliamentary reports is wider in compass than freedom of speech. As mentioned above, the latter privilege is restricted to members of the Reichstag, and not shared by others entitled to address the House, Plenipotentiaries of the States, for instance. But inasmuch as their speeches form part of the proceedings, they may be reported with impunity.

(5) In order to be protected, parliamentary reports must in England be fair, substantially correct, and not published from motives of personal ill-will. In France they must be "made in good faith." In Germany accuracy is the sole condition; as long as they are accurate, reports do not cease to be immune because they are published from oblique motives

and with malicious intent; in other words they are, in English legal parlance, "absolutely privileged."

The privilege variously described as parliamentary immunity in the narrower sense, or as personal inviolability, is almost all-embracing under the German Constitution. (Art. 37.)

(1) Without the consent of the Reichstag no member thereof may, during the session, be prosecuted or arrested for any crime—unless apprehended at the time of its commission or during the following day—or made to suffer any other restraint of his personal liberty for any cause whatsoever. The clause, it will be seen, covers treasons, felonies, misdemeanours, and minor transgressions indiscriminately, whilst in England it has long been established that privilege is not claimable for any indictable offence. Again, it protects deputies from arrest in a civil cause, but not from liability to be sued. The Courts have to take cognisance of this privilege *ex officio,* and without waiting for a demand of the House.

(2) Upon the demand of the Reichstag all criminal proceedings against a member thereof and every form of restraint of his personal liberty are suspended for the duration of the session. Whilst the first clause confers immunity from arrest and from the institution of a prosecution during the parliamentary session without the consent of the House, this provision enables the Chamber to demand a stay of criminal proceedings against, and the release of, a member in custody at the opening of the session. It also operates in favour of a newly-elected member and of a deputy caught *in flagrante delicto* during the session and therefore unprotected by the former clause. Upon the request of the Reichstag not only members kept in safe custody prior to trial are to be set free, and that without bail, but also those serving a sentence. Here again the wording of the article is wide enough to cover every imaginable sin and transgression. But it must not be imagined that the beginning of the parliamentary session is a golden key that unlocks the gates of the convict prison for

representatives of the people. For under the German penal code a conviction of serious crime carries with it deprivation of political rights and therefore the loss of parliamentary mandates. Privilege ceases with the end of the session, except, perhaps, in the case of members of the Standing Committee for Foreign Affairs and of the Watch and Ward Committee. Parliamentary immunity suspends the operation of the provisions of the penal code limiting the time for prosecutions—a clear indication that it is not intended to accrue for the benefit of the individual deputy. Nor will Parliament consult his wishes or his personal convenience in determining whether to waive or to claim privilege on his behalf. Again, the Reichstag will not be guided mainly by the merits or demerits of the case: it will neither conduct a preliminary inquiry into the *primâ facie* guilt or innocence of the accused member, nor act as a court of appeal from the criminal tribunals. In arriving at a decision, the House will pay heed to those considerations only which supply the *rationale* of the institution. It will, in the first instance, make sure that the legal proceedings are not merely a cloak for ulterior motives which the executive may have for keeping away an obnoxious or formidable political opponent. Being satisfied on this point, it will start with a presumption of guilt and carefully weigh whether the balance of public advantage lies in the value of the parliamentary labours of the accused or convicted member or in letting justice take its course.

Closely akin in their object to the privilege just considered are certain statutory rights, not mentioned in the Constitution, which are likewise intended to enable members to devote their whole time and their full attention, during session, to their parliamentary functions. They are exempted from liability to serve as jurors and as lay assessors. Without the consent of the Reichstag no member thereof may, during the session and whilst at the seat of the legislature (in ordinary times, Berlin), be subpœnaed to attend elsewhere as a witness in either a criminal or a civil cause. It is further provided in the penal

code that any one who by force or intimidation or who, being a public official, by an abuse of his official powers, prevents a member of the Reichstag from fulfilling his parliamentary duties is liable to penal servitude or to detention in a fortress.

An interesting innovation in the German Constitution is what may be termed "parliamentary professional privilege," as defined in Article 38. It is based on the same range of ideas as underlies legal professional privilege in this country and the immunity from disclosure, in German law, of communications made in professional confidence to clergymen and legal and medical advisers. It was felt to be in the interest of the community that intercommunications on matters of public concern between the people and their representatives in Parliament should be encouraged and at the same time safeguarded. It is therefore provided that members of the Reichstag may refuse to disclose the names of persons who have imparted to them information of a confidential nature, or to whom they have imparted such information, in their capacity of deputies, or the nature of the information itself. Documents containing statements or proofs of the facts so communicated are likewise protected; they need not be produced, nor are they liable to seizure, and a member's premises may not be searched with a view to such seizure. As in the case of the models on which the privilege of parliamentary professional secrecy is fashioned, no corresponding right is enjoyed by the other party to the communication.

Public officials, whether in the service of the Federation, a state, or a municipality, and members of the armed forces do not require leave for the discharge of their parliamentary duties. If they are candidates for seats, they must be given the necessary leave to prepare for the election. (Art. 39.) In the case of officials of the Federation the Federal Treasury bears the cost of providing a substitute, whilst the States are free to enact that such expense be deducted from the pay of their own civil servants and from that of the municipal officers within their territories. Employees in private concerns and

workmen may claim leave if the business in which they are employed is not seriously prejudiced thereby. (Art. 160.) "The members of the Reichstag are to be entitled to travel free of charge on all German railways and to receive compensation on a scale to be laid down by a federal law." (Art. 40.) As the parliamentary mandate is an office, not of profit, but of honour, members receive, not payment nor remuneration, but what is, in theory at least, merely compensation for incidental expenses; it is therefore not subject to income tax. The amount is fixed by a federal law of 10th July, 1920, which also provides for deductions in respect of each day's absence from the plenary sittings for any cause other than illness, service on a parliamentary committee, or engagement elsewhere on the business of the House.

CHAPTER V.

THE PRESIDENT OF THE FEDERATION.

The wizards of the Constitution threw into the boiling cauldron the most precious extracts collected in foreign lands, mixed the ingredients with characteristic disregard of chemical and physiological incompatibilities, stirred up the brew, added one ounce each of native suspicion and home-grown distrust, and out stepped that strangest homunculus, the President of the Federation.

With autocracy they had done once and for all, and they were under no illusion that the tyranny of Parliament might not become quite as dangerous to the liberties of the people as the will of a despot. It was also perfectly clear to them that no organ other than a President of imposing stature could be relied upon to match himself against the Reichstag and to safeguard the rights of the nation against the lust of power of the representative body. The great problem was how to impart to that office the requisite strength and independence. A study of the texts of the constitutions of the two great republics on either side of the Atlantic promised to supply the key to its solution. Here an omnipotent parliament and a president "nothing more than its clerk" (Duguit), whose sole power, which he is really free to exercise in person, is, as a former holder of the office complained, to preside at the national *fêtes*. There Congress always ready to be swayed by the currents of public opinion and a president more powerful than the head of any other modern state, monarchical or republican. After a careful comparison of the French and the United States' constitutions the difference in the provisions as to the mode of election of the president was promptly fastened upon as fully accounting for the difference in the

position which they occupy in the two countries. A mere creature of parliamentary majorities, could the French president ever dare to defy that authority to which he owes all that he has, all that he is, in public life? Would not the chambers, jealous of their rights, be under an irresistible temptation to elect to the highest magistracy none but a decorative figure-head, who is at the same time a political nonentity? It is far otherwise with the American president: he is chosen by the people, and deriving his title from the same source, he will always be able to hold his own in competition with Congress. *Probatum est.* Make the president the elect of the nation, and all other things shall be added unto him. In a few respects indeed can the American model be improved upon and the authority of the presidential office further enhanced—

(1) by doing away with the intermediary body of electors and making the president visibly the chosen of the people;

(2) by borrowing from France the one point in which her system seems superior, and extending the term of office to seven years;

(3) by putting no limit on the number of times which the President may be re-elected.

The German constitution accordingly provides: "The President of the Federation is elected by the whole German people." (Art. 41.) "The President of the Federation remains in office for seven years. Re-election is permitted." (Art. 43.)

The Chosen of the People indeed! "A candidate is elected if he secures more than one-half of all the valid votes cast. If none of the candidates obtains that majority, a second ballot is held, at which that candidate is declared to be elected to whom the largest number of valid votes has been given. In case of a tie a decision is reached by drawing lots." (Federal law of 4th May, 1920, concerning the election of federal president, par. 4.) In the actual state of the German parties it seems impossible that any candidate should be elected the first time. At the second ballot, for which not only all the

former candidates may be nominated again, but fresh ones as well, the sueeessful candidate is not likely to obtain an absolute majority either. In the absence of election compacts between the parties he is almost sure to represent but a fraction of the voters. On the other hand, if, as the result of inter-party agreements, he secures a heavy poll, all he ean claim is that he is looked upon as the smallest of several evils by a comparatively large number of electors. But even if he started with a more valid elaim to that title, the difference between the life of parliament and the presidential term would not allow him to assert it against the Reichstag for mueh more than the first half of his tenure of office, at the very best. Since the duration of the Reichstag is but four years, that body must necessarily be renewed once, and may be renewed twice, during the presidential term and could then, by reason of its more recent mandate, justly insist, in any confliet with the president, that it was the truer mouthpiece of the voice of the people.

The privilege of birth was thought of itself suffieient to secure for the president a pre-eminent influenee in all matters of state, and it seemed unneeessary to endow him with a wealth of powers at all commensurate with his noble deseent. Without this birthright all the lavishness with which publie rights had been showered upon the Freneh president, had proved of no avail; for was it not truly said of him that "il a assez de pouvoirs; c'est le pouvoir qui lui manque" (Barthélemy)? With it, the German president was sure to make his way in the world. To vest in him the executive power seemed dangerous, since even the Kaiser had had to share it with the federal counеil. Nor did it seem at all essential to the strength of his position. For did not the Freneh and the American constitutions alike confer it in express terms on the president? Yet what a differenee! The framers of the German constitution did not pereeive that in order to have even the potentiality of independenee and authority, the head of the state must be at least "*le chef titulaire du pouvoir exécutif*"

(Esmein), must at least in strict law have a right to it. It was the fear that a really strong man might feel tempted actually to use his constitutional powers that proved fatal to the candidature of "Père Victoire" for the highest French magistracy, and the present holder of this office at any rate made a brave show, before his election, of his intention to assert them. In the minds of the men of Weimar the executive had survived, from anti-democratic days, as a force, redoubtable in the extreme, sinister, and semi-mysterious, that must be chained at all costs. They had not therefore the courage to place it anywhere definitely, least of all into the hands of the president, and the heading of the third section of the Constitution, "*Der Reichspräsident und die Reichsregierung*" (The President of the Federation and the Federal Government, or Executive) proves that he is not even a co-partner in it.

Certain definite functions were assigned to him instead, not dissimilar to those discharged by the Emperor under the Bismarckian constitution. The list, which will be considered later on in some detail, is a fairly lengthy one, but a few only of the powers which it contains appeared really to matter, two of them in particular, viz.:—

(1) "The President of the Federation appoints and dismisses the Federal Chancellor and, on the latter's recommendation, the Federal Ministers." (Art. 53.) "The choice of the ministry is the decisive service which the president is to render to the nation," was the view of the Committee on the Constitution, as voiced by Dr. Naumann; and more important still,

(2) "The President of the Federation may dissolve the Reichstag." (Art. 25.) Duguit, in his Treatise on Constitutional Law, had laid stress on the fact that the power of dissolution had remained a dead letter ever since 1877, as one of the gravest defects of the French political system. An Alsatian author, Redslob, had taken up the idea and elaborated the general thesis that the presidential right of dissolu-

tion is the sole reliable antidote against the dangers of a parliamentary tyranny. His book had recently appeared when the National Assembly was summoned, and it made a great impression on its members. So it came about that the power of dissolution became the centre in which all the rays of the presidential authority were focussed. In what better way, indeed, could he justify his independent existence than by appealing, in case of need, against his co-mandatary to the common source of their delegated power? But the builders of the constitution were sticklers for rigid symmetry in the structure of the state. And since the president was to be the equal of the Reichstag, not its superior, the latter had to be given an analogous power to invoke the judgment of the nation against an objectionable president. "Before the expiration of his term the President of the Federation may be removed from office, upon the motion of the Reichstag, by a vote of the people." (Art. 43.) But was it really enough to have inserted these provisions in the book of the constitution? Did not the French text stare them in the face, conferring a similar right on the president against the chamber of deputies, subject, it is true, to the consent of the senate? Is it at all likely, would be their rejoinder, that the president, the offspring of the union of the two chambers, would conspire with his father to commit matricide? And even if he dared to plan so unheard-of a deed, would the defect of his own strength be supplied by that of a second chamber, which, unlike the first, does not derive its authority from the direct choice of the people? Yes, the framers of the German constitution had made a very thorough study of their texts. But unfortunately "*a verbis legis non est recedendum*" had been their invariable motto. If only for once they had abandoned the maxim and had traced foreign constitutions in their actual working, they would soon have discovered that the parliamentary title of the French president would not of itself have blunted the weapon of dissolution in his hands nor have prevented him from the exercise of his other constitutional functions. They could not

indeed have foreseen that even as this chapter is being written, the newspapers predict a dissolution at the end of the present summer, as a safeguard against an apprehended socialistic landslide in France. But what they would have found is that the first president of the French republic not only made a free use of this very right, but abused it, together with some of his other powers, to so appalling an extent that parliament come to be looked upon as the champion of the rights of the people and any intervention of the president as imperilling the very existence of the republic. They would have discovered that purely personal factors and accidental occurrences apparently determined the line of French constitutional evolution and created precedents that were rigidly followed ever after. And if they had pondered on this strange phenomenon, of which instances might be quoted from other countries too, and sought an explanation, it would soon have dawned upon them that merely fortuitous happenings can produce the effect indicated only if they help on the natural current of constitutional development, and not otherwise. Conventions would have sprung up, before long, in any case, depriving the French president of his constitutional heritage. For a strong and independent head of the state is absolutely incompatible with a parliamentary *régime,* and unwritten conventions are the natural tools with which it eats away the granite of graven texts that stand in the way of its self-realisation. The lessons to be learnt from French constitutional history might have saved the German constitution-makers from that Nemesis, whose anger their slavish clinging to printed formulas excited, and who brought to naught their most carefully planned theoretical schemes.

The strength of the American president springs, of course, not so much from his election by the people as from the fact that he is not merely the titular head of the executive, but actually the chief executive officer in the United States. As has been justly remarked, it is the theory of the separation of powers that has created the American president. To reproduce

him in the fulness of his authority on German soil was out of question. Too many considerations combined to render this quite impossible. The description of the American presidency as "a purely monarchical institution" would in itself have proved fatal. In the next place, it was feared that its importation would be almost certain to let in the abhorred "spoils" system. Again, the conviction was expressed with much emphasis that the system of the separation of powers must of necessity stamp parliament with the marks of intellectual impoverishment and political barrenness. But what carried more weight even than all these arguments was the history of democratic development in Germany. For long decades the demand for parliamentary government had occupied the place of honour in the political programmes of all the progressive parties, and, at last, at the eleventh hour of the old *régime*, just before the outbreak of the revolution, the struggle for it had been carried to a victorious issue. How could the young republic, the triumph of democracy, abandon the main article of faith of its makers? So it was that responsible government became one of the chief pillars of the constitution. "All orders and decrees of the President of the Federation, including those relating to the defence force, must be countersigned by the Federal Chancellor or by the competent Federal Minister. Such counter-signature implies acceptance of responsibility." (Art. 50.) "The Federal Chancellor and the Federal Ministers require the confidence of the Reichstag for the exercise of their offices." (Art. 54.)

The sages of Weimar flattered themselves to have accomplished a masterpiece of inventive political genius. There appeared to them to be no reason why republican constitutionalism should for ever exhaust itself in the familiar alternative of presidential and parliamentary systems of government. Instead of slavishly copying foreign models, they hoped to blend into one harmonious whole all the best which the political wisdom and experience of two continents had matured and, in the creation of a new presidential type,

to find bliss in the golden mean between American exuberance of strength and French abject dependence. The model thus fashioned, with a few native features, would just answer the particular requirements of the new German democratic state. The idea that they were trying the impossible, never occurred to them at all. It did not indeed escape them that under the parliamentary system which they had adopted for better and for worse, the cabinet formed a connecting-link between the president and parliament. What they failed to grasp was that the supposed link was in fact an iron chain which his plebiscitary origin would never enable him to break. Far from realising that parliament had it always in its power to assert its superior strength and to overcome his opposition by rendering it impossible for him to get a ministry, they actually thought it necessary to bring him into subjection to the Reichstag by conferring upon it the right to propose his removal from office to the people; and since a resolution to that effect, if carried in the Reichstag, at once suspends the president from the further exercise of his functions, he is not even in a position to parry the blow by a dissolution. As mentioned above, it was merely for the sake of symmetry that this power, not likely to be used, was given to the Reichstag, though it further detracts from that independence which alone would have enabled the president to act as a check on that house, and *pro tanto* defeats the avowed aim of the constitution. Yet the right of dissolution is not even its real counterpart. For, subject as it is to ministerial counter-signature, its exercise lies no longer at the discretion of the president, but accrues to the benefit of the federal chancellor. This power, together with the few others which the makers of the constitution regarded as indispensable if the president's authority was to be at all comparable to that of parliament, at least ought to have been exempted from the requirement of ministerial counter-signature. As it is, the categorical imperative of Article 50, "all orders and decrees," not only precludes their constructive exemption, but has taxed the ingenuity of the

commentators. How, for example, is the prescription of that Article to be fulfilled in the appointment of a new chancellor? The former chancellor is no longer in office, and normally the whole cabinet goes out with him. Even if it did not, no mere federal minister would be "competent," since the appointment of a prime minister is not a departmental affair. The incoming chancellor cannot act since he is not in office till his appointment is legally perfect. Nor would the suggestion be helpful that the retiring chancellor be requested to remain in office till he had countersigned his successor's appointment. For after he had done so there would be two chancellors at the same time, and only one is recognised by the constitution. Various attempts have been made to solve the puzzle, but none of them is entirely satisfactory. If counter-signature is thus insisted upon even in a case in which it might well be dispensed with on the principle, "*impossibilium non est obligatio,*" it is easy to see how much is left of that presidential independence which was to save the nation from a parliamentary dictatorship. One apparent exception to the rule of Article 50 does exist: the President may resign without the consent of the cabinet, the German authorities being agreed that in taking this step, he exercises a personal right, and not a public function. If this is the fruit of the mixed presidential and parliamentary *régime,* it may safely be asserted that the attempt has failed, as it was bound to fail, and that the dualism in the position of the president is not, as was intended by the framers of the constitution, that of a Janus, with one face turned towards the Reichstag, and with the other towards the people, but rather that of a Hermaphrodite, with the sterility of the mythological prototype for its most characteristic attribute.

Brave efforts have been made by writers to save the German type of presidency from the reproach of utter futility. Again and again it has been said that a man of outstanding ability and resolution will not be content to be as wax in the hands of the ministry, but will find ways and means to make his

presence felt. No doubt; but he will do so in spite, not in virtue, of the position which the constitution has assigned to him. Doubts as to the sufficiency of the constitutional powers alone to make the office one of real authority appear to have assailed the National Assembly itself; for it was there repeatedly mentioned with peculiar emphasis that the constitution postulates for the holder of it a true live man, conscious of his own strength and dignity. Again, the part which the president is intended to play has been likened to that of the sleeping lion—well content to leave matters alone as long as everything goes smoothly, but certain to awake when a critical situation arises and a man of more than ordinary courage, wisdom and character is wanted to take charge of the ship. Quite true; a superman might then act on his own responsibility and save the state even at the risk of breaking the constitution; but where he is to find elbow-room within its four corners is quite a different question. Various arguments have been adduced to show that though the president, as portrayed in the constitution, looks at first sight somewhat pale and anæmic, he yet disposes of considerable sources of latent strength. Thus he is supposed to derive much vigour from his character as the main organ of national unity. But apart from the fact that he shares that title of honour to a great extent with the Reichstag and even with the federal ministry, it must not be overlooked that, unfortunately, German unitarism is largely monarchical in its sympathies and cannot therefore be expected to lend but a rather lukewarm support to the chief republican magistracy. Some authors draw attention to the vast influence which must accrue to the one public man who is of no party, but the trusted leader of the whole people. They point out that the Constitution took special pains to divest the presidency of all political connections, as for instance by disqualifying the holder of that office, alone of all Germans of the proper age, for membership of the Reichstag. (Art. 44.) A pious fiction. As if a candidate had the remotest chance of being elected without being run

by one of the great parties; and the latter are just likely to lend their support to any one but a strong party-man. Moreover, of such intensity is party-feeling that in modern Germany, as in Athens of old, to be of no party is almost the surest way to being distrusted by all. Besides, what can all the alleged hidden strength avail the president, any more than that derived from his plebiscitary election, since the constitution leaves him no scope for displaying it? Others, more realistic, rely on his political affiliations to secure for him a share in the governance of the state. If he belongs to the same parties, they argue, as command a majority in parliament, if perchance he is one of their recognised leaders, his voice is certain to carry great weight with the ministry. In fact, the president and the chancellor will then form a duumvirate, and it will depend entirely on their respective personalities whether the one or the other will exercise the preponderating influence. It is forgotten that in such a case the president misses his vocation, which is to act as a check on the Reichstag. By some of the commentators this idea of a duumvirate is thought to express the normal relationship in which the two stand to one another. It is true, they say, that the president can do nothing without the consent of the chancellor, but it does not by any means follow that the decision rests solely with the latter. In all matters of importance they must try to come to an agreement, and if their opinions differ substantially, to arrive at some sort of compromise. This line of argumentation betrays a misunderstanding of the practical working of parliamentary government and would be untenable even if the Constitution (Art. 56) did not expressly entrust the chancellor with the direction of public policy. The same objection is fatal to the view of those who, imagining that the organic functions of government can be adequately expressed with the aid of algebraic symbols, pretend that the president requires the counter-signature, and is therefore bound by the advice, of the ministry in everything he proposes to do, but is free to disregard it whenever he chooses not to do an act which they consider necessary or expedient. The multiple party system,

as prevailing in Germany, is credited by distinguished writers with affording the president a considerable latitude in the choice of a ministry and thereby opportunities for promoting his own policy. Since only a coalition can ever hope to command a majority in the Reichstag, he may, if dissatisfied with the government in power, dismiss it and entrust with the formation of a new cabinet a party leader whose political opinions are more akin to his own, and the latter will, as a rule, have a fair prospect, if need be after a dissolution, of securing sufficient support from some of the many groups amongst which he is able to choose. The experience of other countries does not, however, lend colour to the view that the multiplicity of parties lends itself to such manipulation as to facilitate at any time the formation of a government of the desired stamp. On the contrary, it seems to make the task one of great difficulty. Time and again we hear that the head of the state sends for one parliamentarian after another and has to be content in the end, after many fruitless attempts, to have got hold of a government of any sort. In Germany things are, if anything, worse. During the short life of the young republic more often than not has the ministry been kept in power by the passive acquiescence or the temporarily suspended hostility of parties that nominally form part of the government *bloc*. In this condition of things it is quite possible, as one writer remarks, that the dismissal of a cabinet from which parliament has not withdrawn its confidence, need not necessarily involve the president in a conflict with that body. The Reichstag may have had no occasion to pass a formal vote of no-confidence and may yet be quite glad to get rid of the ministry. This instance and similar remote contingencies of which the ingenuity of German authors has discovered quite a number in order to demonstrate that the president may have opportunities for acting independently, only go to show for how little he counts in the ordinary course of public business.

The reader may well ask: What for all these theoretical

arguments and *a priori* speculations? Granted that the picture of the president, as drawn in the constitution, is full of contradictions and inconsistencies: in the four years during which it has been in operation experience must have shown what his real position is in the actual life of the state. Even his adversaries would admit that the present holder has conferred great dignity upon the office—no mean accomplishment, since it had no traditions to support it. It is also more than likely that a man of his mature political wisdom has, by his advice, exercised at least some influence behind the scenes. But it cannot be said that he has officially taken an active share in the work of government or personally discharged any of the functions which the constitution nominally assigns to the office. And if, as has been mentioned in an earlier part of this chapter, personal example is likely to create precedent in constitutional practice, as long as it harmonises with natural developmental tendencies, it is improbable that the German chief magistracy will in the hands of his successors differ much, in any important respect, from the presidency of the French republic. It is right, however, to point out that the title of the present holder of the office is still that of provisional president, and that it is derived from election by the National Assembly. And since the strength of the president's position is supposed to lie in his plebiscitary origin, it must be admitted that no further conclusions can be drawn either way from the only evidence hitherto available.

Hitherto an attempt has been made to obtain as clear an impression of the presidential office as the chaotic state in which the Constitution has left the subject, will permit. It is now time to fill in the necessary details.

"Every German who has completed his thirty-fifth year is eligible." (Art. 41.) It will be noticed that the German constitution, unlike that of the United States, does not insist that a candidate shall be a natural-born citizen. Due weight was given to the fact that many an eminent man of German blood has been born the subject of a foreign ruler; the example

of Moltke was in everybody's mind; nor was the large *irredenta* forgotten which the peace treaty had just created. Again, a proposal, copied from the French law of 14th August, 1884, to disqualify members of former ruling houses, was negatived: the ex-Kaiser may yet be elected to the presidency. The only moot point is whether women may become candidates. Those who decide in their favour rely on the constitutional provision (Art. 109) that "men and women have in principle the same political rights and duties," whilst the authorities who wish to exclude them point out that the president has supreme command over the armed forces (Art. 47), and seem to think, perhaps rightly, that the German *Hausfrau* is hardly made for the part of the Amazon.

"When entering upon his office, the President of the Federation takes the following oath before the Reichstag: 'I swear to devote my strength to the welfare of the German people, to further its interests, to guard it from harm, to observe the constitution and the laws of the Federation, to fulfil my duties conscientiously, and to do justice to all men.'" (Art. 42.) Considering the meagreness of his real powers, it is difficult to see how the president is to fulfil his sworn obligations otherwise than by refraining from conduct prejudicial to the commonwealth. A few writers, however, seem to flatter themselves to have saved the situation by interpreting the words "my strength" as signifying "all my strength"; in other words, the office is a whole-time appointment, and the president is not allowed to sell groceries in his spare hours. Of little practical importance as the oath is, it has given rise to controversies. According to one opinion, the president-elect, by taking the oath, completes his title to the office, and a refusal to take it is equivalent to a renunciation of his right to it, just as under the Belgian constitution the heir to the throne who declines to take the oath on the constitution is deemed to give up his claim to succession. As against this view it is pointed out that the Article speaks of "entering upon 'his' office"; that is to say, the office is his before, in virtue of a

complete title, viz., popular election. In the United States the president is to swear "before he enter on the execution of his office," in Germany "when entering upon his office." The oath is not therefore in the latter country a necessary condition precedent to the performance of official acts, and anything done before is perfectly valid. To take the oath is, however, the first official duty which the president has to fulfil, and according to the better opinion by refusing to take it, or to take it promptly, he violates the constitution and renders himself liable to impeachment. Others take a less serious view of the matter and regard the duty to take the oath as no more than a moral obligation.

For the more important powers entrusted to the president those vested in the emperor under the Bismarckian constitution have served as model. The similarity, however, lies on the surface only. For whilst the Kaiser, outside the sphere of legislation, was a free agent and could at any time dismiss the chancellor, if he disapproved of his policy, the president holds his powers *de jure* only, the parliamentary *régime* transferring their *de facto* exercise to the ministry. But even as regard this *nudum dominium* he is not particularly favourably placed, as compared with his American and French colleagues. Both the latter derive their authority from monarchical predecessors, and the garments of the French chief magistrate were purposely so cut as to fit a princely frame. The German emperor owed his main strength to an extraneous source, the Prussian kingship, and was not even the nominal sovereign of the Federation. Supreme authority in the latter resided in the federated rulers of the German states as a corporate whole and was exercised through their representative organ, the Bundesrat. Executive power was thus divided between the emperor and the old Federal Council, and though the president has taken small legacies from the latter, as well as practically the whole estate of the former, he did not come off specially well. The more extreme opposition parties in the National Assembly saw to that, as they were hostile to the

very idea of a presidency and had been clamouring for a directorate after the type of the Swiss Federal Council.

The following are the chief functions of the German president:—

(1) He represents the Federation in its international relations, his authority being subject to but two limitations, viz.:

(a) "Declaration of war and conclusion of peace are effected by federal law."

(b) "Alliances and such treaties with foreign powers as refer to matters of federal legislation require the consent of the Reichstag." (Art. 45.)

(2) He appoints and dismisses all federal officers, both civil and military, "in so far as the laws do not otherwise provide"; he is expressly authorised to delegate this power. (Art. 46.)

(3) He has supreme command over the armed forces of the Federation (Art. 47), but has vested it in the Federal Minister for National Defence by an ordinance of 20th August, 1919.

(4) He takes the necessary measures, if need be with the aid of the armed forces, to compel a recalcitrant state to perform its duties to the Federation. (Art. 48.) In most cases of this kind it will be a matter of controversy between the federation and the state whether the alleged obligation exists at all, or whether it has been infringed. When the question at issue is the consistency of a state law with federal law, an alleged defect in the execution of a federal law by the state, or some problem in the domain of public law, the matter in dispute may have been submitted by either party to the tribunal competent to deal with it under the provisions of Articles 13, 15, or 19. If the latter has decided against the state, the presidential intervention is in form the execution of the judgment of the court. But it is by no means necessary that such a decision has been obtained, or even that proceedings have been commenced. The president is, in the first instance, the sole judge in the cause and may act on his own initiative and responsibility, without prejudice however

to the right of the aggrieved state to appeal to the competent tribunal.

(5) If public order and security are seriously disturbed or endangered in any part of the federal territory, the president may do all that is necessary for their restoration. In particular, he may, if need be, intervene with the aid of the armed forces and suspend certain constitutional guarantees, viz., the right to personal freedom, sanctity of the domicile, freedom of speech, the rights of association and of public meeting, privacy of correspondence, and sanctity of property. (Art. 48.) A federal law is to define his powers in detail. Till it has been enacted, they are unlimited and culminate in the proclamation of a state of siege of the most rigorous type, viz., of a military dictatorship. If matters have come to such a critical pass as to brook no delay, a state may provisionally take measures of a similar kind for its own territory; in doing so, it acts, as it were, as an agent of necessity of the president, upon whose demand the measures taken have to be cancelled forthwith. Of all steps taken in the exercise of the last-mentioned power, or of the preceding one, the president is to inform the Reichstag without delay, so as to give parliament an opportunity to require their withdrawal.

(6) He exercises the right of pardon on behalf of the Federation. (Art. 49.) This power is extremely narrow in scope, since it extends no further than the criminal jurisdiction of the federal courts, and the administration of justice in criminal causes, subject to unimportant exceptions, belongs to the states. It will be noticed that this article is distinguished by a certain *elegantia juris* from the corresponding provision of the United States' constitution, according to which the president has power "to grant reprieves and pardons for offences against the United States." In Germany "federal amnesties require a federal law."

(7) He appoints and dismisses the federal chancellor and, on the latter's recommendation, the federal ministers. (Art. 53.) He has a right to be kept informed by the federal government

about the course of public affairs. The standing orders of the cabinet are subject to his approval. (Art. 55.) He is entitled to attend its meetings and to preside over it, when present, but he may not vote. The presence or absence of the president does not, however, alter the character of those meetings, and a technical distinction corresponding to the French one between *conseil des ministres* and *conseil du cabinet,* is unknown to the German constitution.

(8) He may dissolve the Reichstag, "but only once for any one cause." (Art. 25.) He appoints the day of the general election. (Federal law concerning elections, par. 6.) Upon his demand the President of the Reichstag must convene parliament before the date fixed by the constitution for the beginning of the annual session. (Art. 24.) He appoints the judicial members of, and the federal commissioner to, the tribunal for disputed elections. (Art. 31.)

(9) He may submit to the popular vote a law passed by the Reichstag. (Arts. 73 and 74.) He must authenticate all laws constitutionally enacted and must promulgate them. (Art. 70.)

(10) And finally, by the combined operation of the law concerning the provisional exercise of federal powers and Article 179 he succeeds to the powers formerly vested in the emperor by any pre-revolutionary law. He thus inherits, to mention but two instances, the power of issuing certain ordinances and the right to release debts due to the federation.

Since his nominal powers are all actually exercised by the federal government, it would seem that the president can do no wrong, at any rate in his official capacity. In his character of a citizen it is, of course, different. Crime has been rife in Germany ever since the end of the war, and the contingency had to be guarded against that the president might catch the infection and turn burglar. The constitution accordingly leaves him answerable for his misdeeds, but provides that he cannot be placed in the dock without the consent of the Reichstag. (Art. 43.) It must not be imagined that this privilege

is a concession to the dignity of the office; it is shared by every member of parliament. (Art. 37.) That he can be sued for his debts is not expressly stated, but follows by an *a fortiori* argument. However, the framers of the constitution have thought it necessary to impose upon him a double-barrelled responsibility for his political conduct as well, so that the duumvirate which he is supposed to form with the chancellor turns out to be a *leonina societas*.

(1) He is liable to recall by plebiscite at the instance of the Reichstag. Before the expiration of his term "the President of the Federation may be removed from office, upon the motion of the Reichstag, by the vote of the people. The resolution must be carried in the Reichstag by a two-thirds' majority. By such a resolution the President of the Federation is suspended from the further exercise of his office. The refusal of the people to sanction his removal from office is equivalent to re-election and carries with it the dissolution of the Reichstag." (Art. 43.) This clause presupposes a really powerful and independent president, engaged in a conflict with the Reichstag. For the procedure therein outlined would be meaningless unless it were intended as a contest of political strength between president and parliament. It is significant that no state of facts, far less a *corpus delicti* is defined that is to justify the Reichstag to set the machinery in motion; and the result of the alternative issues in the struggle points conclusively in that direction: the organ ousted disappears from the political stage. The initial advantage, however, lies with parliament: as soon as it has spoken, the president is suspended from the exercise of his functions—and thereby, at any rate, saved the ignominy of having himself to order the plebiscito for his removal from office. It is also remarkable how far the constitution, generally so exacting when dealing with unusual situations, has here fallen short of its habitual standards. No quorum is prescribed for the decision of the Reichstag, no proportion of votes for the validity of the plebiscite, and a simple majority of those actually cast carries the

day. A verdict in favour of the president not only leaves him in office for the rest of his term, but operates as an uncontested re-election for a fresh period of seven years. On the other hand, an adverse decision does not seem to preclude his renewed candidature. In truth, the shadow-president of the constitution has no opportunities for making himself such a nuisance to the Reichstag as to make it worth that body's while to try to deprive him of office. Besides, it has at its disposal a much more convenient means for attaining the same end: it can always drive him out by making it impossible for him to get a cabinet. It may, however, be fairly argued that the clause is not intended to provide a tool in daily use, but an exceptional instrument for dealing with exceptional contingencies. In a somewhat paradoxical fashion does the possibility of his recall by plebiscite actually enhance the moral authority of the plebiscitary president. The trust in him to which the people has attested by his election must be presumed to endure unless and until it is withdrawn by a fresh manifestation of the popular will.

(2) He is liable to impeachment "for a culpable violation of the federal constitution or of a federal law." (Art. 59.) Proceedings on impeachment in general will be discussed at length in the chapter on the "Administration of Justice." Here it is sufficient to remark that in Germany trial on impeachment, though permissible for legal offences only, and though carried on in legal forms, is purely political in its aim, which is to bring about the *mors politica* of the accused party. If the whole procedure on impeachment is an anachronism, since for all practical purposes legal has long since been merged in political responsibility, wherever parliamentary government exists, the German constitution further betrays complete ignorance of the historical foundations and of the *rationale* of the institution if it makes the president, no less than the members of the ministry, liable to this form of prosecution. As Montesquieu (Esprit des lois, Bk. XI. ch. 6) has pointed out, legal responsibility for acts of government is

really vicarious in character. Now all orders and decrees of the president, in order to be valid, must be countersigned, and since "such counter-signature implies assumption of responsibility" (Art. 51), there is nothing left for which the president himself could be called to account, all the less since he is not even titular head of the executive. One of the commentators, struck by this incongruity, has suggested that countersignature does relieve the president of liability, but that he is personally responsible for acts done by him without the consent of the ministry. This interpretation seems untenable. For acts of the last-named order are invalid, according to the Article just quoted; they are not government acts at all, but mere nullities, for which no one can be called to account. It is fair, however, to remind the reader that liability to impeachment is not restricted, in terms at least, to official acts.

The presidency falls prematurely vacant by the death of the holder of the office, by his resignation, by his recall (Art. 43), or by a judgment of deprivation on indictment (Art. 59). Disability, even if permanent, has no such effect. The president, even if incapable of acting, has a constitutional right to his office for the septennial term. Since a vice-presidency, as a permanent post, is unknown to the German constitution, provision had to be made for such a contingency. Article 51 accordingly prescribes that the duty to act as substitute falls, in the first instance, on the federal chancellor, but that if the disability is likely to be prolonged, a deputy is to be appointed by a special federal law.

CHAPTER VI.

THE FEDERAL GOVERNMENT.

NOWHERE are the besetting sins of the makers of the constitution more conspicuous than in their design of the federal government. It betrays their inability to emancipate themselves from the range of ideas associated with a political system which they themselves have buried, and in the resulting distrust of authority in every shape and form, even if exercised in accordance with the will, and subject to the constant control, of the representatives of the people. How else can it be explained that they refused to entrust the government, in principle at least, with the business of government? Again, here, as in the case of the presidency, the joining together of heterogeneous materials has produced a mere patchwork, made even more variegated owing to the desire to please everybody. But what is perhaps most striking is the incorrigible tendency to reduce everything to fixed rule and order and to a rigid discipline, a craving for legal formalism, here all the more out of place, as it is an almost necessary attribute of a parliamentary *régime* that much is left in a fluid state and that there are almost imperceptible transitions from law to convention, and thence to customs, habitual practices, and mere preferences in conduct. A diligent student of constitutional documents of many lands undoubtedly comes across many an oddity; but nowhere but in Germany would he find a clause that the procedure at cabinet meetings is to be regulated by Standing Orders to be drawn up by the government and subject to the approval of the president of the federation, or, worse still, an Article of the constitution actually laying down such a rule of procedure. (Art. 58.)

"The Federal Government consists of the Federal Chancellor and the Federal Ministers." (Art. 52.) The constitution mentions but two of them, viz. the federal minister of finances (Art. 86) and the federal postmaster-general (Art. 88), and neither fixes their number nor defines the departments. This omission is all the more remarkable as the sum total of their activities does not cover the whole field of the executive. The commentators maintain that it falls within the province of the president of the federation to supply the defect and to regulate by ordinances the organisation and duties of new departments, his authority to do so being held to be implied in his right to appoint their heads (Art. 53) and staffs (Art. 46). But as they cost money, has not the power of the purse a say in the matter?

"The President of the Federation appoints and dismisses the Federal Chancellor and, on the latter's recommendation, the Federal Ministers." (Art. 53.) "The Federal Chancellor and the Federal Ministers require the confidence of the Reichstag for the exercise of their respective offices. Any one of them must resign if the Reichstag withdraws from him its confidence by an express resolution." (Art. 54.) From the combined operation of the two articles it follows clearly that the powers of the president are purely formal and to be exercised in conformity with the wishes of the parliamentary majority. This conclusion is not, however, universally and unreservedly accepted in Germany. Nobody doubts that a vote of no-confidence, which compels a minister to resign, imposes a corresponding obligation upon the president to accept his resignation. But it is argued that there is nothing in the text to prevent him from dismissing a minister or ministry yet in possession of the confidence of the Reichstag, and even that the duty to appoint and dismiss the other ministers on the advice of the chancellor, is not imperative. Yet the principle of parliamentary responsibility is nowhere more firmly anchored in the political system than it is in Germany. Indeed, one must go to some of the South American republics to find a parallel for an article of

the constitution laying down in black and white that which everywhere else is a mere constitutional convention. Nor is the difference without importance. A minister remaining in office after he has lost the confidence of the Reichstag would commit a breach of the constitution and render himself liable, in theory at least, to impeachment. And what is equally obvious and at the same time bound to show in practice, the clause in question converts what would otherwise be but political dependence into legal subordination and cannot therefore fail to weaken substantially the position of the executive in its relation to parliament. Even stranger is the rule that it requires an express vote of no-confidence to turn out the government or a minister. Such a provision was, perhaps, unavoidable when once parliamentary responsibility was to be legally sanctioned. For the imponderabilia in the political atmosphere which indicate to a ministry that it has lost the confidence of the House, could never form the foundation of a legal charge, and the rejection of important government measures involves questions of degree likewise incapable of judicial evaluation. But what is really astounding is that the idea seems to be abroad in Germany that this rule is an adaptation of English practice. "Whilst in France a conventional rule compels a ministry to resign if it has been defeated in the Chamber, as for instance if a government proposal or a government bill is rejected, Germany has adopted, both in the Federation and in the States, a rule followed in England in practice, viz. that the ministry need not resign unless an express vote of no-confidence has been passed." (Meissner, Staatsrecht, p. 87.)

Whilst, then, responsible government has been introduced in its most rigid form, the distribution of responsibility is peculiar. To understand it, it is necessary to study in some detail the organisation of the ministry. To the members of the National Assembly the choice seemed to lie between three different types, viz.:—

(1) The monocratic or chancellor system, as it had pre-

vailed in Imperial Germany. The Imperial Chancellor had been the sole federal minister, the secretaries of state and under-secretaries his glorified clerks and subordinates. The relationship between him and them was much the same as that subsisting between the president and the ministers in the United States. He alone was responsible for the conduct of public affairs; they were responsible to him, and to no one else. There was no business in any department of government that he might not transact in person, and whatever was done was done on his behalf and on his responsibility. Bismarck had made the figure of the Imperial Chancellor after his own image, and none but a Bismarck could support the burden of the office. None of the men upon whom his mantle descended proved of a stature sufficiently unreduced in size not to break down under its weight. The adoption of this pattern was quite out of question in a republican constitution.

(2) The collegiate or directorial system, of which the Swiss Federal Council may be taken as the modern prototype. Whilst in one sense the very antithesis of the monocratic form of government, in another aspect it bears a close resemblance to it. Here too the ministers, *quâ* heads of departments, are mere agents bound to act in strict accordance with the instructions of their principal. But the principal is a collegiate body or board, of which they themselves are the members, and members with equal rights, the president being no more than their chairman. The classical statement of the principles underlying this governmental type is Article 103 of the Swiss Federal Constitution: "The work of the Federal Council is divided into departments, each department being in charge of one of its members. This division, however, is made with the sole object of facilitating the despatch of business; the decision lies in every instance with the Federal Council as an official board." But in practice exceptions to this rule have long since been admitted, and it is not at all unusual for federal laws to vest executive functions in the different departments. The introduction of this plan of government into the German

constitution was demanded by the extreme left, as being the only one compatible with genuine democracy. But if it could not be strictly carried out in a small country, in which executive problems are of the simplest order, and where, in addition, it had long-standing tradition in its favour, it was rightly held that its adoption in Germany was not practical politics.

(3) The principle of complete departmental independence, the type of government in the late Prussian monarchy. The departments form watertight compartments, the head of each carrying on its administration in complete independence of, and isolation from, his ministerial colleagues, and on his own responsibility. Such a system, of course, presupposes that the direction of policy issues from some source outside the ministerial body. It worked in Prussia because the king was his own prime minister, and the members of the government more like permanent heads, who managed the affairs of their respective departments in accordance with the principles of policy laid down by him. That such a plan cannot be carried out under a parliamentary *régime* is obvious.

As on other occasions, when confronted with several alternatives none of which seemed acceptable, the men of Weimar resorted to the expedient of selecting parts from each and pasting them together. The federal chancellor, distinguished by his official title, not from the other federal ministers, but from the federal ministers (Art. 52), stands on a different plane altogether. He is not merely prime minister, but combines with this character features borrowed from the monocratic system. It is on his advice that the president of the federation appoints and dismisses the other members of the government. (Art. 53.) He "presides over the Federal Government and directs its business" (Art. 55) and "in case of a tie has a casting vote." (Art. 58.) But, more important than all this, it is he, and he alone, that settles the political programme, lays down the guiding lines of policy, for which he is alone responsible to the Reichstag. (Art. 56.) By reason of that sole

responsibility he has not only the right, but the duty, to exercise a general supervision over the departments, in order to make sure that they are administered in conformity with his policy; and to that extent, as was stated in the Committee on the Constitution, he is free to intervene and to point out inconsistencies therewith in departmental work. But to that extent only. For within the limits prescribed by the chancellor's general policy each federal minister conducts the business of his department in complete independence and on his own responsibility to the Reichstag. (Art. 56.) The responsibility of the chancellor and that of the departmental minister are mutually exclusive; the one begins exactly at the point where the other ends. There are certain matters, however, with which neither the chancellor nor a federal minister is competent to deal, but which are reserved for the decision of the government as a whole, the third principle of organisation, viz. the directorial one, being thus introduced. It has often been commented upon that English and French constitutional law alike ignore the existence of the cabinet. The German constitution is less reticent; it not only assigns definite business to it, but prescribes its organisation in some detail. The chancellor presides and directs the proceedings "according to Standing Orders drawn up by the Federal Government and approved by the President of the Federation." (Art. 55.) "The Federal Government decides by a majority of votes. In case of a tie the Chairman has a casting vote." (Art. 58.) The president of the federation may attend and take part in the deliberations, and, if present, he takes the chair, but in an honorary capacity only; he can neither vote nor give a casting vote; the latter is held to belong to the chancellor or his deputy only. Unlike in France, no special meetings are fixed which the president regularly attends, nor are matters of special importance reserved for occasions on which he is present. The constitution (Art. 57) directs that the following subjects are to be submitted to the council of ministers for deliberation and decision:

(1) Draft-bills. This provision seems to be copied from the

Swiss Federal Constitution (Art. 102 (4)), according to which the initiative in legislation belongs to the Federal Council as a body only. It will be noticed that the German text requires bills to be settled by the cabinet, but does not prescribe that they are to be formally introduced in the Reichstag by or on behalf of the government as a whole. However, according to Article 68 "bills may be introduced by the Federal Government or originate in the midst of the Reichstag itself"; and though the words "federal government" are ambiguous, as will presently be shown, the majority of commentators interpret them as meaning the cabinet and condemn the practice which has sprung up, of individual ministers moving bills in their own name.

(2) Differences of opinion on questions which concern the departments of several federal ministers. The latter term is to be understood in its strict technical sense. Matters of controversy between the chancellor and a federal minister are not referred to the cabinet. For in all matters of general policy the decision rests solely with the former, and interdepartmental questions cannot arise between them, since the federal chancellor is not in charge of any of the administrative departments.

(3) All matters as to which the constitution or the law prescribes this course. It is not always easy to determine with accuracy and precision what subjects are intended by the constitution to be so treated, as the term "federal government" is used therein in a variety of senses, signifying sometimes the federal chancellor, sometimes one or more of the federal ministers, sometimes the cabinet. The following may be quoted as instances of topics which certainly fall under this heading: drafting the standing orders of the cabinet (Art. 55), issuing general administrative orders for the execution of the federal laws (Art. 77), supervision of the execution of such laws by the states (Art. 15), regulating by ordinances the postal and telegraphic services (Art. 88) and the construction and working of railways (Art. 91).

According to the prevalent opinion, the above is a complete

list of subjects on which the decision rests with the council of ministers. A few writers, indeed, hold that it is not meant to be exhaustive, but represents the minimum only insisted upon by the constitution, and that the chancellor and the ministers are free to leave to the decision of the cabinet any question which they choose to submit to it. However rational this view may be intrinsically, considering the meticulous care which the framers of the constitution have taken in delimiting spheres of activities and of responsibility, they, at any rate, cannot have contemplated or intended to authorise such shifting of either. On the other hand, there is nothing to prevent the cabinet from discussing any question on which one of its members wishes to take counsel with his colleagues, and the standing orders of the cabinet actually prescribe that certain matters of special importance, such as appointments to leading positions in the government services, are so to be deliberated upon.

The strange type of parliamentary government here outlined is quite unlike anything known by that name in England. In the first place, whilst the ministers must be acceptable to the Reichstag, they need not themselves be members thereof. In theory a similar rule is recognized in other countries too, but the actual appointment of a non-parliamentarian would always be regarded as a merely temporary and exceptional expedient. Not so in Germany. Chancellor Cuno, for instance, never sat in parliament; yet his selection for the chief office in the government did not on that account excite either surprise or comment. Nor would a minister so appointed have an early chance of remedying the defect, as there are no by-elections in Germany. The latitude of choice thus allowed in actual practice, so far from being looked upon as in any way anomalous, is commended by some writers, as it permits of the selection of a government of all talents and, in particular, of a ministry composed entirely of officials with long experience of public affairs. As far as the members of the government, other than the chancellor, are

concerned, such a selection would be quite in keeping with the spirit of the constitution, which allows the departmental ministers no voice in the determination of the policy, but assigns to them positions not so very different from those occupied by the permanent heads in this country. Indeed—and this is the central fact in the organisation of the German government—the ministry is not a cabinet in the accepted sense, if joint responsibility all along the line is the test of a cabinet. It is true, in the texts of some other continental constitutions a line of demarcation is drawn between the fields of collective and individual responsibility. For instance, Article 6 of the French constitutional law of 25th/28th February, 1875, runs: "Les ministres sont solidairement responsables, devant les Chambres, de la politique générale du gouvernement, et individuellement de leurs actes personnels." But political practice has long since effaced this artificial boundary line. In Germany the differentiation is carried much further. Instead of the government, the chancellor alone is responsible for the general policy, and collective responsibility is the exception. The majority of commentators, instead of recognising the impossibility of giving effect to such over-refinements, draw the extreme logical conclusions from the data of the constitution. Thus, since the government consists of the federal chancellor and the federal ministers, and since each federal minister administers the department entrusted to him, no room is said to be left for the inclusion of ministers without portfolio. Again, as each federal minister is alone responsible for his department, ministers could not, even in an emergency, act in each other's stead. In the case of the chancellor, however, different considerations are thought to apply. Since he is the only member of the government absolutely indispensable, all authors approve of the prevailing practice of permanently appointing one of the federal ministers to the vice-chancellorship, though this office is quite unknown to the constitution. The only question left in doubt is whether the vice-chancellor could act as the deputy of the president of

the federation in case both the latter and the federal chancellor are under disability. Since counter-signature means assumption of responsibility, the commentators are agreed that capacity to countersign must be governed by the constitutional rules as to responsibility. But it is a moot point whether the chancellor may do so in every case, or whether in departmental matters the minister at the head of the department alone is competent. Those holding the former view rely on the fact that the chancellor is responsible for the general policy of every department; the government appears to incline towards, and to adopt, the second alternative. If all this curious learning gives the impression of being no more than juridical hair-splitting that could never square with the broad facts of public life, the provisions as to the business and the procedure of the council of ministers are one mass of absurdity and confusion. Among the means by which the chancellor carries out the political programme, for which he bears the sole responsibility, surely government bills must play a very prominent part. Yet they are the very first topic reserved for the decision of the cabinet as a whole. And how many questions of high policy do not lie hidden beneath all those "matters for which the constitution or the law prescribes that course?" Now all these problems are settled by mere majorities, and it is all in the day's work that the chancellor may be outvoted. Again, fancy any question of such importance that the council of ministers is alone competent to dispose of it, being determined by the casting-vote of the chairman! As if a team so divided on any but the most trivial subject could hold together and remain in office.

It need hardly be stated that the actual government presents in Germany a picture vastly different from that shown in the constitution. Solidarity is the very soul of parliamentary governments, and by levelling down the authority of the chancellor and by levelling up that of the departmental ministers, something approaching the ordinary type of cabinet has been attained. Government by coalition, which the state of parties rendered unavoidable, has acted as the main solvent of the crust

of constitutional anomalies. It is the parties which form the coalition that designate the candidates for the seats in the cabinet allotted to them; the part played by the chancellor in their selection is as nominal as that of the president in making the appointments. This being so, it is obvious that the chancellor has not a free hand in defining the main lines of policy. The political programme is settled by the coalition parties and is, of necessity, in every instance in the nature of a compromise between more or less divergent political tendencies. All matters of importance are not only deliberated upon, but decided by the cabinet, though not by votes and casting-votes, and the chancellor, outside his purely formal rights, is no more than *primus inter pares,* a prime minister. Nor is there in such a system room for the apportionment of responsibilities in accordance with the directions of the constitution. Altogether it is not by votes of no-confidence that governments are brought to fall in Germany. The Reichstag, indeed, remains master of the situation. For there are in Germany no indications of that tendency, so clearly traceable in this country during the last generation or two, towards a shifting of the political centre of gravity from parliament to the constituencies. The poverty of the electorate in political experience and judgment leaves the representatives in parliament, more than in other Western European states, in the uncontested position of trusted guides and leaders and would prevent public opinion from being the immediately decisive factor as to the fate of governments, even if it could be gauged by by-elections. On the other hand, the ministry is not in that state of abject dependence upon the chamber as in France. Something of the prestige of the imperial government still attaches to it, and the Reichstag, not much more, under the old *régime,* than a machine for approving the legislative decisions of the Bundesrat and of the government, has not yet learnt to abuse its supremacy. The normal way in which a cabinet falls to pieces is that one or more of the coalition parties withdraw their support. And since the adherence of some of them is, as likely as not, merely nominal

from the very outset, such a contingency constantly threatens to occur and is bound to give every ministry at the very least the appearance of instability. Yet in spite of the state of fermentation in which the country has been ever since the armistice, cabinet crises have been fewer than is generally the case under a multiple-party system. Both the pressure exerted from without and the unrest within the state have brought home to the Reichstag that it is the main bulwark against national ruin and dissolution of the Federation and have filled it, to an exceptional degree, with a feeling of responsibility. The very difficulty of bringing about such a combination of parties as to give any government a working majority has acted as a deterrent from frivolous attempts at wrecking the ministry in power. There are, moreover, certain forces at work, peculiar to Germany, which exert a steadying influence. One of them is the existence of a powerful centre party, which never varies in strength amidst all the political changes. Held together by the strongest religious bonds, but otherwise mustering under its banners men of every shade of political opinion, it is necessarily compelled to follow a middle course in order to show that united front which it invariably presents. Since it holds the balance between reaction and radicalism, it is destined to form the nucleus of every political combination. Besides, as has been forcibly pointed out by Wittmayer, there is an *imperium in imperio*, entirely ignored by the constitution, which acts as a breakwater to the roaring waves of parliamentarism, a powerful bureaucracy. Highly trained and efficient, and class-conscious with it, it knows that the government could not be carried on for a day without it, and the knowledge of its indispensableness enables it to exert a steady, though silent pressure, if only through its command of the technique of administration; for here, as in so many instances, the form helps to mould the substance.

The government, in whichever of its different senses the term is used, does not enjoy, as has already been mentioned, a monopoly of executive powers, but shares them with other

organs, the Reichsrat in particular. Nor even have they been vested in it subject to definite exceptions specified in the constitution, and this omission is regarded, by some writers at least, as a distinct advantage, inasmuch as it enables the Reichstag, without first amending the constitution, to entrust government functions to other persons, or bodies of persons. Rights and duties of varying degrees of importance are conferred and imposed on the ministry in almost every part of the text, and since the enumerative method is used, it cannot be said that, technically at any rate, the presumption tells in its favour. A good example of the stepmotherly way in which it is treated is that, unlike in other states, the initiative in legislation is not the exclusive preserve of the cabinet and of members of parliament. The federal council and the federal economic council partake of the same privilege, and with such scant courtesy is the government treated that it is compelled to introduce their bills in the Reichstag, formally as its own, however strongly it disapproves of them.

CHAPTER VII.

THE REICHSRAT.

The three most notable federal states in the modern world, the United States of America, the Swiss and the German Federation, have, all of them, been preceded by, and evolved out of, confederacies. In passing from the one type to the other, the sole confederate organ of government, Congress of the American Confederation, the Swiss Tagsatzung, and the German Bundestag, has been retained and transformed into an organ of national government, viz. the American Senate, the Swiss Council of States (Ständerat), and the German Federal Council. The former two bodies are now merely the Upper Houses of the Federal Legislatures; but they retain certain distinctive birth-marks, the most striking of them being the equal representation of the states, irrespective of size and population. For this equality, guaranteed, as especially sacred, by the United States' Constitution and only slightly deviated from in Switzerland in the representation of the half-cantons, is merely accidental in the case of an elected parliamentary chamber, but a characteristic attribute of the organ of government in a union of sovereign states, such as the old confederations were in the two states in question. The Bundesrat of Imperial Germany, on the other hand, in its descent from the ancient Bundestag, has remained true to type: it was substantially but a congress of ambassadors of the German states, or, more correctly speaking, of their sovereign princes, and it was only in accordance with the fitness of things that its non-Prussian members were accorded the privileges of extraterritoriality at the seat of the federal government. But the imperial constitution had endowed it with such multifarious

and heterogeneous powers that President Lowell of Harvard could well describe it as an "extraordinary mixture of legislative chamber, executive council, court of appeal and permanent assembly of diplomats." In becoming the republican Reichsrat, the Bundesrat was shorn of the greater part of its authority and reduced to a mere shadow of its former self. Yet the difficulty remains of comparing it with any other known type of government organ, and if an analogy must be found, it will be discovered in the Roman senate rather than in that of the United States. During the deliberations of the National Assembly it had been proposed to follow the example of the federal sister republics and to convert the Federal Council into a second chamber; and the first draft constitution had in fact provided for its election by the state legislatures. Various considerations combined to defeat this plan. In the first instance ultra-democratic opinion, still inspired by Rousseau's teaching, raised its voice in protest against the idea of reviving the bicameral system, as being incompatible with the sovereignty of the people. In the next place it was pointed out that since party divisions in the German states were on exactly the same lines as in the Federation, the proposed Upper House would be but a more or less faithful reproduction of the Lower Chamber. These arguments were reinforced by particularist fears that, all parties having national programmes, the interests of the states would remain unrepresented or at any rate postponed to party interests, and by particularist demands that the states should share in federal administration no less than in federal legislation, a postulate impossible of realisation if the federal organ were but a legislative chamber. Though the German states have lost much of their statehood, the Reichsrat thus remains a quasi-diplomatic assembly and betrays its non-parliamentary character in every feature, in its constitution and organisation as well as in its objects and functions.

The Reichsrat has been formed "for the representation of the German states in federal legislation and administration." (Art. 60.) While the Reichstag, the President of the Federa-

tion, and the Federal Government are representative of national unity, the Reichsrat alone is based upon, and expressive of, the federal principle. In its composition at least. For in its corporate character it is an organ, not of the states, but of the federation. This follows from the text of Article 5, that "public power is exercised in federal affairs by federal organs in accordance with the federal constitution." It is in this very dualism that the main value of the institution lies. For in Germany where local sentiment is still powerful and quite able to hold its own in competition with national feeling, an organ is indispensable in which centrifugal and centripetal forces are reduced to equilibrium, in which the national will and national wants can be harmonised with the particular aims and aspirations of the states, and where, if the conflict of interests proves too strong for that, a compromise at least may be arranged acceptable to both.

The Constitution has assigned to the Reichsrat a share in federal legislation and in federal administration. But in neither direction is it ever the decisive factor. It has not even coordinato authority with those other organs in which these powers are primarily vested. Its duties are substantially those of an advisory council, viz. in the main, to make suggestions and recommendations, to impart information, to approve, to warn, to check, and to delay.

In the legislative sphere the Reichsrat has, first of all, probulcutic functions in respect of government bills. According to the wording of Article 69 its consent would appear to be a condition precedent to the introduction of such a bill in the Reichstag. All that is meant, however, is that the Federal Government must seek the advice and try to obtain the consent of the Reichsrat. For in default of such consent it may yet proceed with the bill, subject only to the constitutional obligation to explain in Parliament the divergent views of the Reichsrat. The latter body may itself initiate legislation, and the proposed laws must be laid before the Reichstag by the Federal Government, even if it disapproves of them, but it is

expected to state its own views at the same time. Unlike the Federal Economic Council, the Reichsrat cannot delegate spokesmen of its own to support its opinions in the Reichstag. An attempt has been made to make good the defect by a provision in the Standing Orders of the Reichsrat, according to which the Federal Government, acting through the Home Secretary, sends to the Reichstag a list of the representatives of the states in the Reichsrat and, in the absence of instructions to the contrary from the states, indicates them as the plenipotentiaries authorised to appear for them in the Reichstag. This is not, however, a complete remedy. For what these plenipotentiaries have a constitutional right to place before Parliament is the standpoint of their respective governments, and not the corporate opinion of the Reichsrat. (Art. 33.) A bill, whatever its origin, after passing its third reading in the Reichstag, must promptly be lodged with the Reichsrat, so as to give the latter body an opportunity to exercise, within a prescribed time, its right of protest. (Art. 74.) This protest, which must be supported by reasons, is not equivalent to the non-concurrence of a second legislative chamber. It is not directly fatal to the bill, but operates as a suspensive veto, which may be overcome, upon reconsideration of the bill by the Reichstag, either by a two-thirds majority, or even by a simple majority, if upheld by the vote of the people. If the bill has for its object an amendment of the constitution and Parliament insists on carrying it in spite of the protest of the Reichsrat, the latter may demand a referendum. (Art. 76.) The share, then, which the Reichsrat has in legislation is negative rather than positive in character. There is one instance, however, in which its actual consent is required, viz. if the Reichstag augments grants or inserts fresh items of expenditure in the budget. (Art. 85.) The motive for this differential treatment of money bills was undoubtedly the desire to enable the Federal Government to oppose, by reference to an independent outside authority, an effective "*non possumus*" to extravagant demands of the Reichstag. In Germany, as else-

where, the representatives of the people are only too prone to be lavish in the expenditure of public moneys, and a parliamentary government would not find it easy, without some such wholesome constitutional provision, to resist popular claims. Quite possibly similar considerations lie at the root of the conventional rule of the British Constitution that proposals for grants must emanate from the Crown. The distinction made in Germany between the budget and other bills is, however, of theoretical interest rather than of practical importance. For the non-consent of the Reichsrat can be supplied by the very same expedient by which its protest may be defeated. Here, as on other occasions, the German constitution has stultified itself by its hankering after checks and counter-checks.

The part which the Reichsrat plays in federal administration is, perhaps, more important than its share in federal legislation. Not so much on account of its participation in the actual exercise of executive powers, which, as will presently appear, is somewhat narrow in scope, but by reason of its position as the constitutional advisory council of the federal government. "The Reichsrat is to be kept informed by the Federal Ministers about the course of federal affairs. Upon matters of importance the Federal Ministers shall consult the committees of the Reichsrat within whose spheres the subject-matter falls." (Art. 67.) The two-fold provision of this Article entitles the Reichsrat to be consulted about, and enables it to exert a certain influence upon, all kinds of public business from their very inception and throughout their course. The Reichsrat herein has an advantage over the Reichstag, whose parliamentary control of the executive is after all in practice substantially restricted to *ex post facto* criticism. Attention has been drawn to a difference in the language in which the two clauses are couched, the first containing a categorical imperative, whilst the second is toned down to a mere "shall" precept. Again, fault has been found with the Constitution for not providing sanctions by which either obligation could be enforced, while a specially ingenious writer has suggested that if

the worst came to the worst, the Reichsrat might lodge a complaint with the Reichstag and induce it to impeach the ministers so neglectful of their duties. As if all that really mattered, and as if the mere fact that the Reichsrat is the natural channel of communication between the Federation and the states did not offer sufficient political guarantees. In search of information, or with a view to tendering counsel, the Reichsrat and its committees may compel the attendance of any one of the federal ministers (Art. 65), and the Standing Orders provide that communications may be made by, or questions addressed to, the federal government at any meeting of the Assembly or of any of its committees, and that a debate on such communication is to be opened forthwith on the demand on one third of the votes represented at such meeting. Nor need the Reichsrat wait until its advice is sought by the government. There is no branch of federal administration on the business of which the Reichsrat may not deliberate *proprio motu* on the proposal of any one of its members (Art. 66), with a view to making suggestions or recommendations to the executive. At the end of the financial year the Federal Minister of Finances accounts to the Reichsrat no less than to the Reichstag for the way in which the federal revenues have been expended. (Art. 86.) The power of issuing general administrative ordinances for the execution of federal laws, which under the Empire was vested in the Federal Council, has been transferred by the Constitution (Arts. 77 and 179) to the Federal Government "in so far as the laws do not otherwise provide." The Reichsrat can therefore exercise it only in virtue of an express authority conferred by a republican federal law. In two classes of cases, however, does the Constitution provide that the assent of the Reichsrat must be obtained, viz.:—

(1) To ordinances relating to federal laws the execution of which is left to the state authorities. (Art. 77.) The reason is obvious: the surest way to avoid friction is to invite *ab initio* the co-operation of the states in laying down the principles and

in framing the rules and regulations, according to which the laws are to be carried out by their own officials. Though, according to Article 14, the federal laws are normally carried out through that instrumentality, the centralisation of the administration has advanced with so rapid strides that the exceptions threaten to swallow up the rule. The work of the Reichsrat in this direction is certainly becoming of less and less importance.

(2) To ordinances prescribing the rules and fixing the scale of charges for the use of the postal, telegraphic and telephonic services (Art. 88) and to those regulating the construction, management and working of railways (Art. 91). These concerns are now in the sole ownership and under the own administration of the Federation. But as the economic life of the states so largely depends on them, it was considered right to give them a voice in these matters, all the more so since hitherto the railways had been entirely, the other services mentioned in part, under their management, and their experience would therefore render their assistance especially valuable. On the same grounds the co-operation of the Reichsrat is to be sought by the Federal Government in the organisation of Advisory Councils on public means of communication. (Arts. 88, 93, 98.)

A miscellaneous assortment of functions is assigned to the Reichsrat by the combined operation of Article 179 and of the law of 10th February, 1919, concerning the provisional exercise of the federal powers. The Reichsrat is thereby appointed heir to all the powers conferred by any federal law or ordinance upon the Bundesrat under the Empire or upon the Council of States during the period of transition, subject however to the following important exceptions, viz.:—

(1) All powers of jurisdiction, now transferred to the Courts.

(2) As just shown, the power of issuing general administrative ordinances. (Arts. 77 and 179.)

(3) Federal supervision and control in all matters falling within the ambit of federal legislation. (Art. 15.) This power, like the former, is now vested in the Federal Government.

(4) Powers of appointment, now exercised by the President of the Federation. (Art. 46.)

And finally, the Reichstag, if only out of sheer habit, is likely to continue to entrust to the Federal Council tasks for which no other federal organ is clearly singled out. Instances might be quoted from recent legislation.

The constitutional powers of the Reichsrat, as here detailed, appear numerous rather than important and, if contrasted with those of the Reichstag, almost insignificant. And it could not be otherwise. For the whole tendency of the German constitution being in the direction of the unitary state, it could not fail to exalt the national organ at the expense of that representative of regional and particular interests. But it does not by any means follow that the place which the Reichsrat occupies in the actuality of public life corresponds to the low level to which it has been depressed by the letter of the constitution. In the mechanism of government the free play of living political forces proves often more potent than the working of mere legal machinery, however cunningly devised. Now the Reichsrat has behind it the full weight of that large body of public opinion which in Germany still centres in the states rather than in the Federation. At every step the Federal Government comes up against it and is bound to harmonise its policy with the wishes of the states, with the result that it is dependent upon, if not technically responsible to, the assembly in which the latter become articulate. Nor must it be overlooked that the Reichsrat, as will presently appear, is largely composed of men who have been trained in the art of government in the service of the states, and is therefore bound to embody a good deal of that experience of public business which is none too abundant in Germany. If these considerations apply to the part played by the Reichsrat both in administration and in legislation, the political conditions prevailing in Germany tend to lend special weight to its right of protesting against bills passed by the Reichstag. In the present state of the political parties the two-thirds' majority required

to overcome this protest will hardly ever be obtained, and the appeal to the people is an *ultima ratio* to which in ordinary circumstances it will be difficult to resort. From all this it follows that in spite of the stepmotherly treatment which it has received in the framing of the Constitution, and though it cannot claim to be the equal of the Reichstag, the Reichsrat is yet a factor that has seriously to be reckoned with.

The constitutional powers of the Federal Council having been exhaustively dealt with, an interesting extra-constitutional function may be mentioned in passing which the old Bundesrat undertook spontaneously. In true appreciation of its essential character as a congress of state ambassadors it began to pass "consensual resolutions," which were really quasi-international conventions, on matters, such as spelling reform, motor traffic on public highways, &c., which were not subjects of federal legislation and with which the Bundesrat as a federal organ had therefore nothing to do, but which it was yet desirable to regulate on a uniform basis. Such resolutions had to be adopted unanimously and created treaty obligations which the states had to carry out. There is no reason why the Reichsrat should not continue this practice, except that so little is now left to the autonomy of the states.

Nowhere does the difference between the Reichsrat and a second legislative chamber appear more clearly than in the rules governing the membership of the former. The fact that its members represent the states as such, is brought out with particular distinctness if it is remembered that the electoral areas for the Reichstag, unlike those for the lower houses in the United States and in Switzerland, entirely disregard state boundaries. Again, in contrast with the American Senate and the Swiss Ständerat, membership of the Reichsrat, subject to an exception to be considered later, is on a non-elective basis. "The states are represented in the Reichsrat by members of their governments." (Art. 63.) It is true the Federal Constitution prescribes (Art. 17) that "each state government requires the confidence of the state parliament," so that

ultimately the peoples have some control over the representatives of their respective states in the Reichsrat. But this influence is indirect and remote, and the fact remains that it is the governments, and not the peoples, of the states that are represented in the Reichsrat. The Constitution, in laying down that the states should be represented by members of their governments, obviously contemplated that the task should fall to the lot of the state ministers. But in practice the term "governments" has been given a very expansive interpretation and is held to cover the permanent heads of the administrative departments, some of whom are, as a rule, sent to the Reichsrat, instead of ministers. This step has been facilitated by what at first sight looks like a liberty which the Standing Orders of the Reichsrat have taken with the Constitution in authorising the states to appoint deputy representatives "either permanently or for a special purpose or for a certain time." The appointment of deputies is unknown to the text of the Constitution and would be unthinkable if the Reichsrat were a House of Parliament, but it is quite in keeping with its actual constitutional position. It is further characteristic that the Standing Orders speak throughout of plenipotentiaries and deputy plenipotentiaries. While the deputies, like the principal representatives, derive their authority directly from the states, a plenipotentiary himself, "if prevented from attending a plenary meeting, may appoint in writing the plenipotentiary of another state to act as his substitute." The Standing Orders further provide that "officials sent by the states to the meetings of the Reichsrat or of its committees to assist their plenipotentiaries, may, with the consent of the assembly, take part in its deliberations." Since the Reichsrat is not a House of Parliament, membership thereof is not a disqualification for a seat in the Reichstag. Being a permanent quasi-ambassadorial congress, the Reichsrat in its corporate capacity never dies, each representative holding office at the pleasure of his own government. For a similar reason the members are in the pay of their respective states and do not, as do the members of

the Reichstag, receive compensation out of federal funds. It is worth nothing that in both these respects the Swiss Ständerat, though now avowedly a legislative chamber, bears a close analogy to the Reichsrat: Article 83 of the Swiss Federal Constitution lays down that the members are compensated by the cantons, and the only case in which it is liable to dissolution is that of a popular vote in favour of a total revision of the Constitution, when both Houses are to be elected afresh in order to carry it through. (Sw. Fed. Const., Art. 120.)

The German constitution prescribes the number, not of representatives, but of votes, to which each state is entitled in the Reichsrat (Art. 61), leaving it to each state to appoint as many representatives as it chooses up to the maximum of its voting power. (Art. 63.) "In the Reichsrat each state has at least one vote. In the case of the larger states one vote will be assigned for every 700,000 inhabitants. A surplus of not less than 350,000 inhabitants is reckoned as 700,000. No state may be represented by more than two-fifths of the total number of votes. The number of votes is settled afresh after each general census." The redistribution of votes is effected by the Reichsrat itself. Here the Constitution seems to have abandoned its conception of the Reichsrat as a semi-diplomatic assembly, which would have postulated equality in the treatment of the states, a principle adhered to in the composition of the United States' senate and of the Swiss Ständerat. The vast difference between the German states in area and population, in wealth and in power, a difference unequalled in any other federal state, rendered it impossible to reduce, for instance, Prussia and Schaumburg-Lippe to a common factor and had already in the German Confederacy caused the logic of international law to succumb to the logic of facts. The Bismarckian constitution had adopted, with but slight variations, the distribution of votes in the old Bundestag, and its republican successor has changed the principle, but not to a vast extent the practical result, when introducing the test of population. From the latter there are, however, two deviations:

(1) Each state, even the smallest one—and the smallest one has less than 50,000 inhabitants—is given at least one vote, a clear concession to the federal principle;

(2) No single state may have more than two-fifths of the total votes.

The latter provision is a *privilegium odiosum* imposed upon Prussia and must be read in conjunction with the *clausula antiborussica* of Article 63, according to which "one half of the Prussian votes is assigned to the Prussian provincial administrations, in accordance with a state law to be enacted." The one reduces the voting strength of Prussia far below the number to which that state would otherwise have been entitled by reason of its population, the other deprives even that diminished number of its proper weight, by splitting it up between the government and the provincial representatives. Moreover, in granting the Prussian provinces separate representation in the Reichsrat and thereby raising them to the level of states, the Constitution, as it were, anticipates the triumph of its policy of dismemberment of Prussia. Technically the provincial members are representatives of the Prussian state and paid by the Prussian fisc. But their votes are not at the disposal of the government. The Prussian law of 3rd June, 1921, by which effect is given to the provision of Article 63 of the Federal Constitution, expressly guarantees their independence, but lays down that prior to each meeting of the Reichsrat the Orders of the Day are to be deliberated upon in a joint sitting of the plenipotentiaries of the government and those of the provinces with a view to arriving at a common decision as to voting. In practice the object of the Constitution seems to be accomplished more often than the end aimed at in this paragraph; for it appears that in divisions on matters at all contentious the government representatives and those of the provinces are usually found in opposite camps. In another direction is the symmetry in the composition of the Reichsrat disturbed by the presence of these provincial representatives; for they are the only elected members in an assembly of diplomats, being

periodically returned by the votes of the Provincial Committees. The special regulations as to Prussia could not be carried out under the scheme of distribution of votes, as originally laid down in the Constitution, according to which the larger states would have had one vote for every complete million of inhabitants, with an additional vote for a surplus equal to the population of the smallest state. An amendment of the Constitution of 24th March, 1921 substituted the revised version of Article 61 quoted above. The total number of votes thereunder is 66, and these were distributed, by a resolution of the Reichsrat of 28th April, 1921, in the following manner. Prussia was given 26 votes, of which one half goes to the government, whilst each of the provinces, including the metropolitan province of Berlin, is entitled to one of the remaining thirteen. Bavaria obtained 10 votes, Saxony 7, Württemberg 4, Baden 3, Thuringia, Hessen and Hamburg 2 each, and each of the remaining smaller states received one vote.

Whether the members of the Reichsrat are free to vote according to their convictions or are bound by instructions, is left an open question. The Constitution does not expressly apply to the Reichsrat the rule laid down in the case of the Reichstag that members are subject to their conscience alone. On the other hand, it advisedly refrained from reproducing the provision of the Imperial Constitution that votes which are not instructed are not counted. It was felt to be the business of the states to decide whether or not to bind their representatives by instructions, and not for the Federation to interfere as between a state and its plenipotentiary. Nor must it be forgotten that the Constitution starts from the idea that the states are represented in the Reichsrat by members of their governments. The solidarity of a minister with the Cabinet of which he is a member seemed to offer sufficient guarantees that he would vote in accordance with its policy. Within the limits so prescribed it was thought to be an unmixed advantage to allow members a certain latitude; for in the absence of such discretion the debates would become unreal, the vote being predetermined by those

who have not heard the arguments for and against a motion. "Here we presume a state to be represented by a statesman capable to decide on his own responsibility because he knows the political views and tendencies of his government and of his parliament." But since it is the universal practice to send to the Reichsrat departmental officials, instead of ministers, instructed representation is unavoidable, the Prussian provincial members alone enjoying the freedom of elected deputies. Again, the Constitution gives no answer to the question whether all the representatives of a state must vote in the same way. To lay down a general rule to that effect would have meant in the case of Prussia to defeat the very object for which half the votes were assigned to the provinces. As regards the other states and the Prussian government votes the principle applies as a matter of course. A state *quâ* state can have but a single will and cannot, without stultifying itself, split its vote. The representatives of the same state, if members of the Cabinet, have one common policy, and if civil servants, receive uniform instructions. That this was the intention of the Constitution follows from the fact that it is content to determine merely the number of votes to which each state is entitled, and allows its full voting power to be exercised irrespectively of the number of its representatives. Indeed, a practice has sprung up in the Reichsrat for the head of a state delegation, the "voting plenipotentiary," to record the state vote in its entirety. "A simple majority of the votes is sufficient for a decision" (Art. 66); in case of a tie the motion is lost. A peculiar concession is made to the members by the Standing Orders of the Reichsrat. If a plenipotentiary is unable to make up his mind there and then he may postpone recording his vote till the next plenary sitting at which the minutes of the meeting in question are settled. This, of course, gives him an opportunity to consult with his government.

The Reichsrat does not possess the privilege of assembling of its own accord. It is summoned by the Federal Government, which must convene it upon the demand of one-third of its

members. (Art. 64.) It is hardly worth while to draw attention to the slovenly drafting of this Article: what is obviously meant, is a third, not of the members, but of the total vote. The clause has indeed no more than theoretical interest, showing, like some others, that in the view of the Constitution the Reichsrat is a Council of State intimately associated with, and ancillary to, the Federal Government. In practice it has been replaced by a provision in the Standing Orders, according to which the Reichsrat remains assembled in permanent session. The pressure of business which made this change necessary, is a clear indication that the Reichsrat plays a vastly greater part in the affairs of the nation than the letter of the Constitution would suggest. It was, however, in a hurry to sell its newly acquired independence. For the Standing Orders further provide that the Reichsrat cannot adjourn for more than a few days without the consent of the Federal Government, which, acting through the Home Secretary, also calls its plenary meetings, though a sitting must be held upon the demand of one-third of the total vote.

Another mark of inferiority with which the Constitution has branded the Reichsrat, is that though free to regulate its procedure by Standing Orders of its own drafting (Art. 66), it is not master in its own house to the extent of being allowed to elect its President. "A member of the Federal Government presides over the Reichsrat and its committees" (Art. 65), but being a stranger to the House, has neither a vote nor a casting-vote. Here, again, just as in the representation of the states, the established practice disregards the strict letter of the Constitution. Rigid conformity to it would have meant too heavy a claim upon the time of the Federal Government. A compromise, sanctioned by the Standing Orders, has therefore been found. Over the plenary meetings a federal minister, generally the Home Secretary, does preside; but the chairmanship of the various committees is delegated to permanent federal secretaries. "The members of the Federal Government have the right and, if requested, the duty to take part in the delibera-

tions of the Reichsrat and its committees. They are entitled to speak at any time during the debate" (ibidem). In being permitted to speak during the debate only, though at any time during the debate, i.e. without having to wait for their turn, they receive less favourable treatment in the Reichsrat than in the Reichstag, where they can claim to be heard "without regard to the Orders of the Day." (Art. 33.) "The Federal Government as well as each member of the Reichsrat are entitled to lay proposals before the Reichsrat." (Art. 66.) Each representative individually, and not only every state, may take the initiative. The members of the Reichsrat are therefore in a more privileged position than those of the Reichstag, by the Standing Orders of which motions must be supported by at least fifteen signatures. "The plenary sittings of the Reichsrat are public, but strangers may be excluded during the discussion of certain subjects, in accordance with the Standing Orders" (*ibid.*). The Committees, on the other hand, sit in private, and the Standing Orders lay down that the deliberations therein are to be treated as confidential. No quorum is prescribed for the Reichsrat itself, but "no vote may be taken in any committee unless at least one half of the members entitled to vote be present." (Standing Orders, par. 37.)

The Constitution leaves the appointment and organisation of committees entirely to the discretion of the Reichsrat. The only binding instruction which it lays down is that in none of the committees may any state have more than one vote. (Art. 62.) Nor does it invest any of them with such exceptional powers as have been conferred on certain favoured committees of the Reichstag. (Arts. 34 and 35.) The Standing Orders provide for eleven Standing Committees, viz. on foreign affairs, economic matters, home affairs, budget and accounts, means of communication, taxes and customs, justice, the constitution and standing orders, national defence, maritime affairs, and execution of the peace treaty. The Committee on the Constitution and Standing Orders defines the business of each committee. Each standing committee has a membership of

nine, the members and their substitutes being states. It is for the states to decide which of their plenipotentiaries in the Reichsrat is to represent them on each of the committees of which they are members. The membership of each committee is determined once and for all, the four most important states, viz. Prussia, Bavaria, Saxony, and Württemberg, being on each committee, whilst the smallest states, such as Waldeck and Schaumburg-Lippe, are not included in the lists at all, either as ordinary or as substitute members. As an example the composition of the Committee on Foreign Affairs may be quoted. Its regular members are Prussia, Bavaria, Saxony, Württemberg, Baden, Thuringia, Hessen, Hamburg, and Brunswick, the substitutes Mecklinburg-Schwerin and Oldenburg.

CHAPTER VIII.

THE FEDERAL ECONOMIC COUNCIL AND SYSTEM OF COUNCILS.

One more organ of government claims attention, the Federal Economic Council, to which, as will presently appear, a subsidiary share in legislation is assigned by the constitution. It is a body of an entirely novel character, without parallel in the public law of any foreign state. To understand the fundamental ideas upon which it rests, its composition, and the part which it is to play, it is necessary to study in some detail the system of councils, as planned in Article 165.

A good deal of confusion and misunderstanding as to the origin and nature of these councils exists in German constitutional literature, in which a statement, first made in the National Assembly, is constantly quoted, viz. "that the system of councils has found an anchorage in the German constitution," the term councils being here used in a sense in which it connotes government by Soviets. In other words, the impression prevails that a remnant of those workmen's and soldiers' councils, of which Germany had had a brief experience after the outbreak of the revolution, has been admitted, tamed and with its poison-fang extracted, to a permanent place in the polity of republican Germany. It is hardly necessary to repeat here that anything in the nature of a class régime, any institution suggestive of a proletarian dictatorship, either in the central government or in that of the states, is absolutely inconsistent both with the letter and with the spirit of the federal constitution; and in fact, the councils created by the latter have nothing in common with their revolutionary namesakes, though ideologically they may be traced to the same source. As the

reporter of the committee on the constitution explained, "the basic aim in setting up councils is to establish, by the side of the political organisation of the state, an independent economic organisation which is to be entrusted with the task of solving economic problems with the aid of the economic forces themselves." The needs of the times, it is claimed, are too great and too urgent to leave their solution any longer to the unchecked caprice of the private entrepreneur, while the state with its clumsy bureaucratic armory, with its reliance on stereotyped formulae and rules of thumb, could never do them justice, could not follow them in all their protean changes and incalculable developments, and would, moreover, constantly be exposed to the temptation to subordinate economic to political interests. Being social questions, it is for society, and not for the state, to find the answers. The root-idea, then, is the supposed dualism of state and society, as first taught by Hegel and developed, in the economic field, by one of his disciples, Lorenz von Stein, whose conclusions may be summed up in the propositions that the relationship of industrial society to the power of the state consists in the usurpation of the latter by the propertied classes, and that wherever capital predominates in industry, it invariably monopolises in its own interests every organ of government. A similar range of thoughts inspired Saint-Simon and culminated in the Marxian doctrine of class conflict. Now this conflict may be conceived as being, by an inherent necessity, a war to the knife, in which the labouring masses must win the complete mastery, unless they will be content to remain slaves for ever; and the organisation for this struggle of the proletariate is the essence of the system of councils, as set up in the Russian Soviet republic. A more hopeful view of the situation, on the other hand, suggests a peaceful solution on democratic lines. Without in any way denying the reality of conflicting interests, this school of thought attempts to provide organisations through which they can be harmonised and equilibrated. Besides, it points out that to insist upon this antagonism alone is to take a very one-

sided view of the relationship of capital and labour, since in their character as agents of production their interests, if not identical, run in parallel grooves and therefore invite co-operation. In order to ensure this it is necessary, however, that both parties abandon all ideas of domination and are prepared to meet on a footing of perfect equality. These principles are the foundations upon which the councils of the German constitution are built up.

Other influences too were at work in Weimar helping on the proposed severance of the economic from the political organisation. Some forty years earlier Bismarck had conceived the plan to bring about their divorce in order to withdraw this important department of social activities from the arena of party strife and had established to this end an economic council in Prussia, which was to serve as a model for a similar federal body. Though the experiment proved a complete failure, a like hope animated the national assembly. It was overlooked that in the modern world their respective attitudes to the economic questions of the day determine, more than anything else, the main lines of cleavage between the different parties, and that therefore the economic organisation itself must unavoidably become their principal battle-ground. Moreover, the democratic principle, favouring decentralisation, gave a powerful impulse to the tendency towards self-government in the economic, as in every other sphere.

As has been shown in the first chapter of this book, democracy, in the German constitution, is not only the ruling political principle; its spirit also permeates the whole of the social, and in particular of the economic, fabric. The age of autocratic government and of the absolute supremacy of capital in industry belongs to the past. The workman is no longer a mere machine, an automaton whose limbs move rhythmically to the tune of the employer's orders; in future he is to lend his brain no less than his arms to the furtherance of the common task. "Workmen and employees are called upon to co-operate, on an equal footing, with employers in the regulation of wages

and of the conditions of labour, as well as in the general development of the productive forces." To the solution of the two former classes of problems the practice of collective bargaining between the existing voluntary associations of employers and of workmen, viz. combinations of entrepreneurs engaged in the same branch of industry and trades unions respectively, proves equal. Indeed, they seem to be better qualified for it than the statutory councils. The constitution is therefore content to leave them those functions and to recognise them and the "tariff" agreements concluded and to be concluded by them. On the other hand, to ensure the desired co-operation "in the general development of the productive forces," it relies on two series of measures:

(1) the socialisation of economic undertakings (Art. 156) —a subject that will be studied in the concluding chapter of this work;

(2) the organisation of councils (Art. 165).

Corresponding to the twofold relationship subsisting between capital and labour, two sets of statutory bodies are planned in the constitution:

(1) Workmen's Councils, organs of class representation, intended to safeguard the interests of the employed as against the conflicting claims of the employers, to help in the peaceful settlement of disputes arising out of that antagonism, and to assert and enhance the influence in the economic sphere of the working class as a whole.

(2) Economic Councils, on which employers and employed are to co-operate in furtherance of their common interest in the productiveness of industry. In their composition, however, a third group of interests has not been overlooked, often at variance with the claims of the other two classes, viz. those of the consumers. They are the "other interested sections of the community" whose representatives are to join with the representatives of capital and labour "for the accomplishment of the economic tasks."

No provision is made, it will be noted, for organisations

representative of employers alone. The reason is that such bodies, all invested with the character and privileges of public corporations, have long been in existence, such as chambers of commerce, chambers of industry, agricultural chambers.

The system of "chambers" is very highly developed in Germany. Besides those just mentioned, there are, amongst others, chambers of advocates, of medical practitioners, of pharmaceutical chemists, of artisans. In fact, almost every important occupation and profession has such a representative body of its own, officially recognised, constantly engaged in watching, in its interests, the course of legislation and administration, and consulted by the government on all matters on which it is competent to advise. The federation is given power, in Article 7, to provide for the organisation of such chambers, and, in the exercise of this authority, the constitution (Art. 130) prescribes the formation of bodies representative of public officials. The labouring class could not well be denied a privilege so widely enjoyed, and the workmen's councils of Article 165 are on all-fours with those chambers. They are to be organised in three grades:

(1) Works' Councils for each single industrial undertaking.

(2) District Workmen's Councils, on a territorial plan, to correspond with industrial areas.

(3) A central Federal Workmen's Council.

It is for the federal legislature to regulate the composition and functions of these councils. Up to now the works' councils alone have been constituted, by a federal law of 4th February, 1920. According to its provisions they are compulsory for all economic undertakings in which not less than twenty employees and workmen are engaged, whilst in smaller concerns their place is taken by a single spokesman. The members of the council are elected for one year. The employer is entitled to attend and to preside over their meetings. The representatives of the clerical staff and those of the hands form two committees to deal with subjects which affect exclusively one of these classes. This statute substitutes constitutional for abso-

lute government in factory and warehouse. The entrepreneur is no longer sole master in his house. The works' councils are entrusted with two different groups of tasks:

(1) To co-operate with the employer in all matters tending to make for the success of the undertaking. They are to assist the management with their advice in order to further the efficiency of the enterprise and to secure economies, to collaborate in the introduction of new working methods, to help in promoting peace and harmony and in the settlement of disputes. In the case of large undertakings, *i.e.*, such as employ at least three hundred manual and fifty clerical workers, they have a right to inspect the balance-sheet.

(2) To safeguard the social and economic interests of employees and workmen. They are expressly warned not to interfere in any way in matters which fall within the province of the trades unions. But it is their duty to watch that tariff agreements and awards of arbitrators are faithfully carried out. They assist in drafting factory regulations, listen to complaints, and arrange for the redress of grievances. They have a voice in the engagement and dismissal of employees and workmen. And, finally, they see to it that all prescribed measures are taken for their safety and welfare.

District Economic Councils and a Federal Economic Council are to be formed out of the corresponding workmen's councils, organisations of employers, and representatives of the consumers and are "to be so constituted that all important occupational groups are represented thereon in accordance with their respective economic and social importance." Double provision is thus made that economic questions may be considered in every possible aspect. The functions of the economic councils are "the accomplishment of the economic tasks in general and collaboration in the execution of federal statutes on socialisation in particular."

After every care has been taken to separate the economic field from the political province of government by creating, for the solution of economic problems, self-governing bodies which

have their roots in society, as opposed to the state, the organisation, after all, has been incorporated in the political system. For the statutory body in which it culminates, the federal economic council, has been erected into a supreme organ of national government, by having assigned to it a subsidiary, but by no means insignificant, share in federal legislation. Its influence upon the course of legislation is exercised in two ways:

(1) "Bills of fundamental importance in relation to matters of social and economic policy, before being introduced in the Reichstag, shall be submitted by the government to the Federal Economic Council for an expression of its opinion."

(2) "The Federal Economic Council itself has the right to initiate such bills. If the government does not agree with any such bill it is nevertheless bound to introduce it in the Reichstag, with an explanation of its own standpoint. The Federal Economic Council may delegate one of its members to appear before the Reichstag in support of the bill." Within its particular sphere the position of the federal economic council, as a subsidiary organ of legislation, is similar, though on the whole slightly inferior, to that of the Reichsrat. Before introducing a bill in the Reichstag, "the federal government must obtain the consent of the Reichsrat" (Art. 69), whilst the bill "shall be submitted to the federal economic council for an expression of its opinion." (Art. 165.) That the imperative is categorical in the former, but not in the latter, case, does make a real difference. But the "consent" proves in the end to be no more than "an expression of opinion," since the result is exactly the same whether it be given or withheld. Again, in cases of differences of opinion on government bills the federal government is bound to explain to the Reichstag the divergent views of the Reichsrat, but not of the federal economic council. On the other hand, the latter body has this advantage over the Reichsrat that it may, whilst the Reichsrat may not, send a spokesman of its own to the Reichstag to support a bill originating with it.

The federal economic council is the apex of the pyramid formed by the councils of the constitution and cannot therefore be set up till all the lower strata have been laid down. But since in the economic stress and strain many urgent problems awaited a solution, a provisional supreme economic council has been constituted by an ordinance of 4th May, 1920. As it will undoubtedly serve as a pattern to its permanent successor, its organisation will repay careful study. It is a large body consisting of no less than 326 members. Its composition is as follows:—

(1) 68 representatives of agriculture and forestry, together with a further 6 for market-gardening and fisheries;
(2) 68 representatives of industry;
(3) 44 representing commerce, banking, and insurance;

These three groups of members are appointed by the federal government on the nomination of economic organisations, territorial and occupational, and partly of employers, partly of employed.

(4) 34 representing transport, communications, and public undertakings;
(5) 36 representatives of handicrafts;
(6) 30 representatives of consumers;
(7) 16 representing public officials and the liberal professions;
(8) 12 members nominated by the Reichsrat for their expert knowledge of the economic conditions of different parts of the federation;
(9) 12 members invited by the federal government for specially meritorious services rendered to the German nation in the economic sphere.

The qualification for membership is the same as for the Reichstag. Membership of the one does not disqualify for a seat in the other. The status of members of the economic council closely imitates that of members of parliament. The members represent, each of them individually, the economic interests of the whole people; they are subject to their con-

science alone and not bound by instructions. (*Cp.* Art. 21.) No proceedings, legal or disciplinary, may be instituted against any member for the way in which he has voted nor for any utterance made by him in the exercise of his duties as a member, nor may he be called to account anywhere outside the council. (*Cp.* Art. 36.) The members have the same privilege as to the refusal of evidence as members of the Reichstag (*cp.* Art. 38) and are equally entitled with them to travel free on all German railways and to receive compensation. (Ordinance of 28th June, 1920; *cp.* Art. 40.) Officials and members of the defence force do not require leave for the exercise of their functions as members. (*Cp.* Art. 39.) Members must carefully refrain from using for corrupt purposes any facts, measures, or plans, of which they have acquired knowledge by reason of their membership and from publishing any proceedings of the council and its committees which the chairman has pronounced confidential. The whole of the procedure too is fashioned on the parliamentary model. As in the case of the Reichstag, a special tribunal judges of elections and returns. (*Cp.* Art. 31.) The council elects its own officers. (*Cp.* Art. 26.) Its sittings are public; but the public may be excluded by a resolution carried by a two-thirds' majority. (*Cp.* Art. 29.) Accurate reports of the proceedings in public sittings are privileged. (*Cp.* Art. 30.) The committees sit behind closed doors unless it be resolved by a two-thirds' majority that the public be admitted. Representatives of the federal government may attend all sittings of the council and of its committees, and at their request they must be heard at any time. (*Cp.* Art. 33.) On the other hand, the council and its committees may demand the presence of representatives of the federal government (*ibid.*). Who is to represent it is decided in each individual case by the federal government or by the federal minister to whose department the subject under consideration belongs. The states too are entitled to send plenipotentiaries to the federal economic council for the purpose of explaining the standpoint of their government in respect of the subject under delibera-

tion. (*Cp.* Art. 33.) The provisional federal economic council exercises all the constitutional powers of the permanent body, subject to the following two exceptions:

(1) It has no right to demand that bills originating with it, of which the federal government disapproves, be introduced in the Reichstag.

(2) It is not entitled to delegate one of its members to appear before the Reichstag in support of a bill initiated by it.

These powers could not be conceded to it since it owes its existence to an ordinance, and not, as prescribed by the constitution for the permanent council, to a federal statute. Moreover, it deviates in its composition from the constitutional plan laid down for the permanent body; *e.g.*, the federal workmen's council which is to be largely represented on it, has not even been formed. On the other hand, it exercises those powers incidental or ancillary to the discharge of its main functions. Thus the council and its committees carry out investigations into important social and economic questions, sometimes of a type for which in this country a royal commission would be appointed; see, for instance, its recent inquiry into the causes of the sudden collapse of the mark. In order to obtain the necessary information, it is authorised to summon experts to appear before it or its committees and to call on the federal ministers to procure for it the relevant departmental data.

So closely in many respects has the federal economic council been assimilated to the Reichstag that the question has been asked whether it has not been the intention of the framers of the constitution to lay in it the foundations of a future second chamber, representative of the people in its occupational divisions, which would in time prove the equal of the older house, in which representation is on a territorial basis. If it is remembered that, on the continent at least, parliaments originated in what were really assemblies of local government authorities, the suggestion does not seem so far-fetched that a supreme council representative of economic self-governing bodies should run through a similar course of development.

Besides, in the early days of constitutional government in continental countries, representation of occupational interests was relied upon, no less than local political organisations, to supply the necessary elements for the formation of an upper house. On closer inspection, however, it becomes manifest that it is to the Reichsrat, and not to the Reichstag, that the federal economic council has the nearer affinity. It has aptly been termed the step-brother of the Reichsrat. For though similar in kind, its powers are exercisable within a narrower sphere and are, even within its province, more circumscribed than those of the latter body. Now if, in spite of its right to protest against laws passed by the Reichstag, which is not shared by the federal economic council, the Reichsrat, as has been shown, is in substance but an advisory council, far less can the federal economic council aspire to the position of an organ of legislation approximately co-ordinate with the Reichstag. It is true, the Reichsrat derives its chief strength, not from its constitutional powers, but from the play of political forces; and it is not impossible, perhaps not even improbable, that the federal economic council may gain, by reason of the highly important interests for which it stands, a political influence incommensurate with the modicum of authority which it derives from the letter of the constitution. But there is nothing to indicate that it will ever become a serious rival to the Reichstag.

CHAPTER IX.

FEDERAL LEGISLATION.

"FEDERAL laws are enacted by the Reichstag." This laconic statement in which Article 68 sums up the process of legislation, is but a half-truth. Indeed, in the simplest case, viz. that in which all organs of government are in perfect agreement upon a proposed law and upon every one of its provisions, it may be accepted as literally correct. But otherwise the principle so boldly expressed is subject to a good many qualifications and limitations, each defined with so much detail as to render Section V. perhaps the most complicated part of the Constitution. From an almost inexhaustible source of distrust of every single power in the state has sprung a system of checks and counter-checks, which already during the debates in the National Assembly was justly described as quite incompatible with democratic ideas. Even so the clause may be defended as merely drawing attention to the central fact that the Reichstag is the only normal and indispensable factor in legislation, whilst the co-operation of no other organ is of vital necessity: others may originate laws or exercise a suspensive veto; the Reichstag alone is the creative force in legislation. There is, however, one power in the state to whose decisions the Reichstag has to bow, the sovereign people. It is true, in no case can a law be submitted to the popular vote unless it has previously been voted upon in Parliament, and the compulsory referendum is unknown to the German Constitution. Still the authority of the people, distant and difficult as it is to move, remains the supreme arbiter of the fate of laws. The Reichstag then makes law, but law always subject to a resolutive condition, and to that extent at any rate the clause in question cannot be acquitted of a *suppressio veri*.

"Bills may be introduced by the Federal Government or originate in the midst of the Reichstag itself. (Art. 68.) The familiar distinction is here drawn between government bills and private members' bills, but the English reader must be warned against understanding either term in the sense which it would naturally suggest to him. In the first instance, members do not severally enjoy the privilege of initiating legislation. The Standing Orders of the Reichstag interpret the vague expression "in the midst of the Reichstag" as signifying fifteen members, this number having apparently been chosen in order to enable the smallest parliamentary fraction to propose laws, though, of course, the fifteen supporters need not necessarily belong to the same fraction. So little is the right to introduce bills understood to be an inherent privilege of Parliament that German constitutional writers have found it necessary to justify it on two grounds, viz. as a right of minorities, and because of the greater despatch with which urgent laws may be enacted, since the procedure is less complicated than in the case of government bills. Again, a good deal passes in Germany under the name of government bills with which the government has but a purely formal connection. For while the government and the members of the Reichstag alone have the legislative initiative *stricto sensu*, i.e. the right of introducing bills in the legislative chamber, a number of other organs, viz. the Reichsrat, the Federal Economic Council, and the Electorate have what may be called the indirect or mediate initiative, that is to say, they can compel the government to lay before Parliament draft-laws proposed by them. Hence arises the distinction between government measures, properly so called, and government bills, in a merely technical sense, which the government only passes on, in fulfilment of a constitutional obligation, together with comments of its own. Since the power of originating legislation has been distributed with so lavish a hand, it is all the more striking that the President of the Federation alone should be excluded from that benefit. For once the framers of the Constitution have preferred to be guided

by the logic of facts rather than to copy the French pattern. For since he could not have exercised it but subject to the parliamentary responsibility, and therefore on the advice, of the cabinet, nothing could be gained by bestowing upon him an authority purely formal and fictitious.

Every government bill, whatever its origin, before being introduced in the Reichstag, must be considered and voted upon by the cabinet. This rule applies, not only to measures involving serious political issues, but to every proposed law, even if it deals with some unimportant departmental detail; Article 57 admits of no exception. Draft-laws too for which the government acts merely as a conduit pipe, must be made the subject of collegiate deliberation; for when laying them before the Chamber, the government is bound to explain its own, i.e. its corporate attitude towards the proposed measure. (Arts. 69, 73, 165.) Nor is that all. Article 68 confers the initiative in legislation on "the federal government," *i.e.*, on the Cabinet, not on the individual members thereof. A divergent practice has, however, sprung up to the deep disgust of constitutional purists, and it is the rule now for ministers to introduce bills in their own names. In the case of a government bill proper one more preliminary condition must be fulfilled before it can reach its final destination: it must be submitted to the Reichsrat. According to the wording of Article 69 the consent of this body is required. But however important, and in some cases even indispensable, such consent may be from the political point of view, in the legal sense the expression is not correct. For the Article proceeds: "If the Federal Government and the Reichsrat cannot agree, the former may introduce the bill all the same, but, in doing so, must explain the divergent views of the Reichsrat." If the proposed legislation involves fundamental principles of social or economic policy, the bill "shall" be submitted to the Federal Economic Council, and its opinion ascertained. (Art. 163.) Its opinions are in no sense binding on the government.

As mentioned above, the Reichsrat may draft bills, which

the federal government must introduce in the Reichstag, even if it disagrees. Each member of the Reichsrat has an individual right to lay proposals before that body (Art. 66), though in practice one of the states will, as a rule, be found to be the driving force. A like privilege is enjoyed by the members of the Cabinet (*ibidem*). Since the government itself has the initiative, the occasions for originating legislation in this roundabout way must be exceptional; yet contingencies may arise in which it prefers to hide behind the authority of the Reichsrat. But it does avail itself of its right to preside over and attend the meetings of that assembly (Art. 65) in order to influence its decisions. If the Cabinet approves of the proposed law it usually adopts it as its own and proceeds with it as a government measure to which the Reichsrat has assented. The dissent of the Reichsrat from a government bill mostly assumes the shape of an alternative bill, with the strange result that two competing legislative proposals, both of them technically government bills, will be laid before the Reichstag. When submitting to the Reichstag a draft-law formulated by the Reichsrat of which it disapproves, the government has the constitutional right to explain to the legislature its own divergent views. (Art. 69.) The Reichsrat, on the other hand, has no official spokesman there to support its proposal, and the provision in its Standing Orders by which the representatives of the states in the Reichsrat are in principle identified with their parliamentary plenipotentiaries, supplies but a very inadequate remedy. This defect is not, however, of far-reaching importance. For under a system of Cabinet government an expression of disapproval by the ministry means in itself the death-knell of the bill.

The indirect initiative of the Federal Economic Council is limited to the sphere of social and economic legislation. (Art. 165.) Considering that these topics absorb the lion's share of modern parliamentary labours, the power conferred upon it is by no means narrow in scope. Its proposals, like those of the Reichsrat, become technically government bills,

but they receive preferential treatment in so far as that body may delegate one of its members to appear before the Reichstag in support of them. Only one; but this is an advantage rather than a drawback since the single representative speaks with the full authority of that body and does not run the risk of having his position weakened by the arguments of a colleague whose views happen to differ from his own.

Finally, one-tenth of the voters may compel the Federal Government to introduce in the Reichstag a bill drafted by them.

When once the bill has reached the Reichstag by any of the routes just indicated, the procedure, as regulated by the Standing Orders of the House, does not differ substantially from general parliamentary practice, except in one respect. Certain non-members have a constitutional right to take part in the debate on the proposed law, viz.:

(1) Members of the Federal Government and Commissioners appointed by them. (Art. 33.) A similar rule is found in the French and some other continental constitutions; but since there a minister without a seat in Parliament is hardly ever heard of, it is of practical importance only in so far as under the bicameral system it enables every member of the government to speak also in that House to which he does not belong.

(2) Plenipotentiaries of the states, who may attend to explain the attitude of their governments towards the bill. (Art. 33.)

(3) In the case of a bill originating in the Federal Economic Council a delegate of that body, who may appear in support of such bill. (Art. 165.)

German jurists are in the habit of dissecting up the process of legislation into two functions, which they regard as quite independent of one another, viz. settling the text of the law and clothing the text so settled with a command. As if Parliament engaged in the first instance in a mere literary exercise, and as

if the provisions of a bill had any significance without constant reference to their enforcement. This strange doctrine was originally advanced, not on scientific, but on political grounds, in order to let in through a back-door an alleged superiority in legislation of the old Federal Council, which it had been denied by the Imperial Constitution. Why it should be maintained now when only one legislative organ remains, is a mystery not easy to fathom. As soon as a bill has passed its third and last reading in the Reichstag, the Constitution calls it a law (Arts. 73, 74), with perfect logical consistency since according to Article 68 "laws are enacted by the Reichstag," and though it does not come into force till a certain time after publication (Art. 71), it is looked upon as a law, not merely *in posse,* but *in esse*. The argument by which commentators justify the use of the term is that as soon as the Reichstag has spoken its last word in the matter, the act becomes binding—not, it is true, on the citizens—but first of all on the Reichstag itself which is no longer free to change its mind or even to alter an iota of the text, and, secondly, on the President of the Federation, who is bound by the Constitution to publish it. Both these claims are true *sub modo* only. For a good deal may happen meanwhile to prevent the so-called law from ever becoming operative or from being promulgated, for which reason it is said to be subject to a resolutive condition. Such a description is erroneous; for the meaning which it conveys is that the law is and remains in force till the event happens that puts an end to it. A law that is not in force, has never been in force, and may never come into force, is not a law at all. It ought at this stage rather to be spoken of as an Act of the Reichstag, or since the Reichstag is the German Parliament, even as an Act of Parliament, provided that it is clearly understood that in Germany a law and an Act of Parliament are not interchangeable terms.

Reference has just been made to the statement that the President of the Federation is bound to promulgate Acts of the Reichstag. This contention cannot be maintained. For the

Constitution (Art. 73) gives him an express and absolute authority to order a referendum instead. This power was conferred upon him, not so much to give him a chance to match his will against that of Parliament, but rather to enable him to invite the decision of the Electorate whenever he has reason to believe that in a given instance the representatives of the people do not correctly interpret the popular will. Since he acts as trustee of the people, his discretion is not, legally, subject to any conditions and limitations. In the sphere of financial legislation he alone can demand a referendum. In short, his power extends to laws of every kind—but to laws only, not to resolutions of the Reichstag which are not laws; and to laws in their entirety only, not to isolated clauses.

The challenge may come from the Reichstag itself. The opposition outvoted on a bill need not accept its defeat as final. For "the promulgation of a federal law is to be postponed for two months upon the demand of one-third of the members of the Reichstag" (Art. 72)—according to the more favoured interpretation one-third of the full membership is meant—in order to give the Electorate an opportunity to demand a plebiscite. (Art. 73.) This is an interesting combination of the optional referendum with the protection of parliamentary minorities. Since here the popular demand is reinforced by that of a substantial parliamentary minority, one-twentieth of the voters is sufficient to set the machinery in motion, whilst the initiative in legislation must proceed from at least one-tenth of the electorate. To prevent the privilege here conferred from being abused as an instrument of obstructionist tactics, the Constitution prescribes that the President of the Federation may—may, not must—disregard the demand emanating from the Reichstag and publish the law in spite of it if both the Reichstag and the Reichsrat declare it urgent (Art. 72), the intervention of the Reichsrat, as an impartial authority, being required in order to render the rights of the minority effective. Here again only a law as a whole, not a single provision, may be submitted to the decision of the people, and nothing but laws.

Therefore the question discussed with some warmth in Switzerland, whether international treaties are likewise subject to the facultative referendum, is, for Germany, answered in the negative by the Constitution, except in the single case of treaties of peace, for which the form of law is prescribed (Art. 45); and even these latter will presumably be saved from a plebiscite by the application of the urgency clause.

As indicated above, a bill initiated by the people is, in the first instance, dealt with by Parliament, technically as a government bill. Thereafter, however, it must be submitted to the popular vote, unless it has been passed unamended by the Reichstag. In the latter instance alone is the referendum dispensed with (Art. 73), and then only the automatic referendum which would otherwise form the necessary complement of the popular demand for the bill. The right of the President of the Federation, for instance, to appeal to the Electorate is not affected thereby, and with good reason. For the demand of the people for the bill, after all, amounts to no more than that it is supported by one-tenth of the voters, and it may remain doubtful in this case, as in any other, whether it finds favour with the people as a whole.

"The Reichsrat may protest against laws passed by the Reichstag. The protest must be lodged with the Federal Government within two weeks after the final vote has been taken in the Reichstag, and must be supported by reasons within a further period of two weeks at the latest." (Art. 74.) In order to enable the Reichsrat to decide within the period prescribed whether or not to exercise its right to protest, its Standing Orders provide that "all bills passed by the Reichstag are to be entered on the Order Paper of a plenary meeting within one week after the final vote has been taken in the Reichstag." The Reichsrat being presided over by a member of the ministry (Art. 65), they further lay down that "the resolution of a plenary meeting to protest against a law passed by the Reichstag is deemed to be a protest lodged with the federal government at the time when the chairman of the meeting takes cognisance

of the fact that the resolution has been carried." The protest to be effective must be lodged within the fortnight; but nothing prevents the Reichsrat from deciding before the end of it not to make use of its right. In fact, to avoid unnecessary delay, the practice has been adopted to pass a resolution to that effect in non-contentious cases at the earliest possible moment. Such a resolution, generally but erroneously described as consent, is really in the nature of a waiver and estops the Reichsrat from thereafter protesting, as also does an implied waiver, *e.g.*, a declaration of urgency to defeat a demand for postponement of the publication of a law under Article 72. The right of the Reichsrat to protest is entirely negative in character; its actual assent is required in one single instance only, viz. to grants or augmentations of grants at the instance of the Reichstag. (Art. 85.) Though the want of consent in the latter case can be supplied by exactly the same means by which a protest may be overridden, the difference is not one of form only, but has certain practical consequences; *e.g.*, the want of consent can never be made good by mere lapse of time. The Reichsrat may protest against any law, and it makes no difference that the measure in question was launched forth by the federal government with its consent, or that it originated with the Reichsrat itself: that body is at liberty to change its mind. Again, the Reichsrat may object, not to the law in its entirety, but to certain specified provisions; in form the protest must even then be directed against the law as a whole. The proximate effect of the protest is that "the law" is referred back to the Reichstag for further consideration. Parliament is therefore free to recast it as it pleases and to amend provisions to which the Reichsrat has not objected. If the Reichstag adheres to its former attitude, the ultimate fate of the bill depends upon the majority by which it is now passed:

(1) if not less than two-thirds of the members present vote for it, the President of the Federation must promulgate it within three months or order a referendum;

(2) if passed by less than a two-thirds' majority, it must be

dropped unless the President of the Federation tries to save it by an appeal to the people.

The protest of the Reichsrat is not then an absolute veto. It is often said to be equivalent to a suspensive veto; but it is something more than that. For a suspensive veto, as commonly understood, is defeated by an increased, usually a two-thirds', majority in Parliament, whereupon the contested bill automatically becomes law. In Germany, on the other hand, the final decision rests, not with the Reichstag, but with the President of the Federation and with the Electorate. In the case of bills by which the constitution is to be amended, the Reichsrat itself can enforce its protest by insisting upon a plebiscite after the Reichstag has passed it twice with two-thirds' majorities. (Art. 76.) What the Constitution directs to be submitted to the popular vote is "the matter in dispute" between the Reichstag and the Reichsrat. (Art. 74.) Hence follows—

(1) that when the protest is limited to one or more isolated provisions, not the whole law, but so much of it only as is contested, is made the subject of a referendum;

(2) that the Electorate is merely to decide between the two alternative proposals and may not at the same time introduce, or be invited to vote upon, a third suggestion.

In the exercise of its discretion as to the use of its right of protest the Reichsrat will, of course, consult federal interests as a whole, but it will, at the same time, be influenced to a large extent by the consciousness of its essential function as "the representation of the German states in federal legislation." (Art. 60.) In the actuality of political life it is the strength and support which it derives from this position, and not the need of improbable parliamentary majorities to overcome it, nor the spectre of the referendum in the background, that make its protest redoubtable. Nor will it often be called upon to use this weapon; the knowledge of its existence puts sufficient psychological constraint on the Federal Government and even

on the Reichstag to ensure for its views a respectful hearing, and not in the final stages alone, but from the very inception of every important legislative measure. Indeed, though the Constitution carefully hides the secret, the Reichsrat is the only effective check on the legislative omnipotence of Parliament.

In the theory of the Constitution the various means just outlined for reversing a legislative act of the Reichstag are not mutually exclusive; they may combine and compete in an almost endless variety of ways. For the one aim and object in which they all culminate is to invoke the authority of the people against a parliamentary decision. Now the ingenuity of writers has not exhausted itself in attempts to discover the roads by which this goal may be most easily reached in different circumstances, but has also applied itself to the discovery of combined measures by which to stultify the will of the sovereign people. How, for instance, can the plebiscite be evaded in the case of a bill originating with the electorate and on which the majority of voters have set their hearts? It can be done by a conspiracy of the organised powers in the state, in the following way, viz.:

(1) The Reichstag passes the bill unamended. For otherwise it must at once be submitted to the popular vote.

(2) The Reichsrat protests.

(3) The Reichstag, to which the bill is referred back for further consideration, again passes it unamended, but is careful to do so by a simple, and not a two-thirds' majority. The bill now is lost unless the President of the Federation decides on a referendum.

(4) The President of the Federation does nothing of the kind, but allows it to drop.

But even in this case the door is not completely barred. For a minority of the Reichstag may yet take the preliminary steps necessary to enable a sufficient number of voters to demand a referendum. In this instance, it will be noted, the decision of the people will be invoked to ratify, not to disallow, a law passed by the Reichstag.

From the constitutional provisions just expounded at length it appears clearly that none of the collateral factors in legislation, other than the Electorate, can oppose an absolute veto to the decisions of the Reichstag: they can raise difficulties, create obstacles, cause delays, but in the last resort they can but rely on the people to render their objections effective. Again, by the popular vote alone can a law be enacted against the will of Parliament. There are, however, but two instances in which the Electorate assumes the true character of a legislator, viz.:

(1) when it decides for a law in the original form in which it was demanded by the people, after the Reichstag has either rejected or amended it;

(2) when it sides with the Reichsrat against the Reichstag in a conflict about the terms of a proposed law.

In all other cases the part which it plays is limited to either confirming or disallowing an Act of Parliament. But whilst undoubtedly the supreme, it is nevertheless but a subsidiary legislative organ. It can never rise quite unaided and claim to be heard, but has to wait till its interposition is invited by some extrinsic authority. Nor can it ever intervene or be asked to intervene unless the Reichstag has first spoken; plebiscitary legislation to the exclusion of Parliament is unknown to the German constitution. And since the popular vote is never taken unless and until a resolution of the Reichstag on the same question has preceded it, it is no more than a corrective of, or a check upon, parliamentary decisions. Indeed, the constitution clothes an Act of Parliament with no mean authority; for "a resolution of the Reichstag can be invalidated by the popular vote only if the majority of those entitled do actually vote." (Art. 75.) With its applications and incidents minutely regulated by the Constitution, the referendum thus appears, from the purely legal standpoint, not only a living reality, but an institution of great importance to the body politic.

If the augur's nod can occasionally be discerned between the lines of the texts, the problem must be studied in its political

aspects if the share which the referendum is destined to have in German legislation is to be appraised at its true value. In the Weimar Constitution the attempt is made for the first time to combine direct with representative democracy in the government of a large modern state. After all that is progressive had striven hard for many a year for a parliamentary *régime*, now when the ripe fruit lay in its grasp, fears, doubts, and scruples assailed the framers of the Constitution, and they displayed great anxiety to provide adequate safeguards against the arrogance, tyranny and possible excesses of a triumphant parliamentarism, safeguards that seemed all the more necessary for want of a second chamber. The direct participation of the people in legislation appeared to offer a good many collateral advantages too. An excellent instrument of political education was here ready to hand. As he might be called upon at short notice to decide vital issues, the citizen would be compelled to study at first hand the political problems of the day, as they presented themselves, instead of being carried away periodically in the maelstrom of political passions, as it rises and swells at election time. Indeed, many a dissolution and many an unnecessary general election might be avoided by submitting to the popular vote highly contentious measures. The plan would further guarantee that proposed laws would be considered from every possible point of view, and not exclusively from the narrow visual angle of the professional politician. Besides, what better means could be devised of counteracting the popular distrust of representative institutions, only too sure to arise and so often artificially nourished? And finally, since the Swiss experience has shown it to be a measure highly conservative in its operation, it seemed to form a strong rampart against the onslaughts of extreme radical agitators. All these arguments were given their due weight, with the result that both the popular initiative and the referendum found their way into the Constitution.

Whilst in the Swiss Federation amendments of the constitution alone may be originated by the people, the German consti-

tution admits the popular initiative in respect of ordinary laws as well, but insists upon the formulative initiative, *i.e.*, the demand must always be accompanied by, and based on, a draft-law. It was recognised that it would be far too easy to enlist sufficient support among unreflecting voters for a mere suggestion, a catch-word, a shibboleth, capable of the most varied interpretations and therefore unfit to be translated into the actual terms of a bill. To nip in the bud any possible attempts at freak-legislation, the proportion of voters by which the demand must be supported, has intentionally been made high, viz. one-tenth. For the referendum initiative one-twentieth was held sufficient; for in this instance the way for the popular demand is always paved by a minority of the Reichstag, and the law in question has already been debated and voted on in Parliament. At first sight these rates do not seem so much higher than those exacted by the Swiss Federal Constitution, in which the figures are 50,000 and 30,000 respectively, corresponding roughly to one-twentieth and one-thirtieth of the voters. It must not, however, be forgotten that in Germany the franchise is on a much wider basis, being given to women on equal terms with men, and enjoyed by more than half of the people, whilst in Switzerland only one out of four has a vote. Expressed in terms of population, the ratios are one-twentieth and one-fortieth in Germany, one-eightieth and one hundred-and-twentieth in Switzerland. Nor are the immensely greater difficulties which the initiative encounters in the former country, adequately reflected in the fact that the proportion of the people that has to make a move is three or four times higher than in Switzerland; but they become at once apparent if it is remembered that that ratio represents three and a half, and one and three-quarter, millions of voters, figures that seem absolutely prohibitive. Yet as if the deadweight of this mass were not enough to discourage even the most eager of popular innovators, good care has been taken in the law of 27th June, 1921, by which the procedure is prescribed, to place further obstacles in their path. The members of the Reichstag would

not be Germans if they had missed the chance to subject to bureaucratic regulation and to bind with plenty of red tape the freest of all popular institutions. The collection of signatures could not be left to private or party enterprise, to the house-to-house canvass customary both in Switzerland and in states of the American Union. A preliminary application for leave to initiate a bill, signed by five thousand voters, has to be lodged in the first instance with the Home Secretary. He may, however, dispense with these signatures if the application is made on behalf of an association by its president, who succeeds in satisfying him that it represents the wishes of not less than ten thousand members thereof, each one in possession of the franchise. The application having been duly examined and found in order, the dates are advertised on which the collecting lists open and close, the intervening period generally covering a fortnight. Lists in approved form have to be supplied by, and at the expense of, the applicants. They lie open in the vestry hall of every parish, whither the citizen has to resort in order to enter his name under the supervision of the local authorities. Now who is to set the ball rolling? Not the political parties, since even the smallest parliamentary fraction may introduce bills in the Reichstag. Nor will their funds permit them the luxury of engaging in an agitation concerning a single bill violent enough to stir up the voters to a referendum initiative. Not associations of a more limited scope and with a special axe to grind, such as the various "anti-bodies"; the numbers which they would have to muster even for the preliminary struggle must prove a sufficient deterrent to them. Certainly not the unorganised electorate. Indeed, in the multiplicity of German parties and in the eagerness with which they compete for popular favour, it is unthinkable that a measure really desired by a few millions of voters, should fail to be taken up by any of them and automatically to find its way into Parliament. It may therefore be predicted with confidence that the provisions of the Constitution concerning the initiative of the people are doomed to remain a dead letter.

The referendum, as conceived in the German constitution, differs a good deal from foreign models and bears distinctive features of its own. The compulsory referendum has found no place in it, nor has the facultative referendum in its classical form, in which it rests with the electorate alone to bring it into action. In Germany it is interlinked with, and made to depend upon, the intervention of parliamentary minorities and can always be prevented by a declaration of urgency negativing the necessary condition precedent. Again, the referendum is not the necessary complement of the initiative of the people. According to Swiss constitutional doctrine the proposal is understood to be made to the people by the people and has therefore to be put to the popular vote, even if approved by the Federal Assembly. In the theory of the German constitution the bill is proposed by the people to the Reichstag, and the referendum is dispensed with, if the latter body adopts it unamended. In the two forms just mentioned the referendum deserves no further attention; by its implication with an impossible initiative it is deprived of all practical significance. The normal type of the German referendum is a species of optional referendum too; but it is the President of the Federation, and not the people, to whom the option is given. It is a sort of consolation prize awarded to him to make up for the loss of the suspensive veto possessed by his American cousin. What suggested to the builders of the Constitution the idea of placing that power into the hands of the head of the state, was probably a reminiscence of the "royal referendum," as demanded by the King of the Belgians on the occasion of the revision of the constitution in 1893. But whereas the latter was intended to be used by the sovereign independently of his cabinet, the presidential veto in Germany is fettered by the requirement of ministerial counter-signature, which seems fatal to it. For how can a government, responsible to the Reichstag, ever countenance its exercise in open opposition to the declared will of the parliamentary majority? To save it from the reproach of utter futility, commentators have drawn attention

to peculiar sets of circumstances in which a referendum may yet be possible. The Reichstag itself may not be disinclined to shift on to the people the responsibility for the decision of matters of exceptional importance. This is a contingency not so very unlikely to arise in the present political situation of the country. Who will doubt, for instance, that both the ministry and the Reichstag would be only too glad to let the electorate rather than themselves incur the odium of having passed measures highly unpopular, yet necessary for the execution of the peace treaty? Again, the plebiscite may offer a welcome opportunity for reversing a resolution carried by a chance majority on a surprise division against the wishes of the cabinet and of the majority parties. It will be noticed that in both these cases the referendum does not operate as a check upon parliamentary majorities, but in furtherance of their true intentions. Once given the necessity of ministerial co-operation, this is, in fact, the only direction in which it could ever be used, if at all. So too, the wishes of the Reichstag will determine the attitude of the President in the face of the protest of the Reichsrat. If the bill has been passed, upon reconsideration, by a two-thirds' parliamentary majority, the alternatives are promulgation or plebiscite, and no chancellor would ever consent to a referendum. But how if it is passed by a simple majority only? In this instance the bill is lost unless the President submits it to the popular vote. Here at last, German writers believe, a chance is given to the President to assert his own will against the government and the Reichstag. Not to order a referendum, is a forbearance, not an act, and in deciding to take the step he is therefore free from the shackles of ministerial counter-signature. According to the letter of the constitution he undoubtedly is; but is he in practice? It is not easy to imagine that the President whose whole position is one of dependence upon his constitutional advisers, should in a remote contingency, such as the one here contemplated, all at once forget his part and avail himself of a technicality to violate the spirit of the constitution. But granting that he did,

the free exercise of his discretion in the sense indicated would merely add another instance of non-user of the referendum, and would not help this institution into actual life. Yet this is the only case in which the plebiscite would be of practical value; for it is the only one in which the decision of the people is invited in order that it may ratify a bill passed by the Reichstag. A referendum ordered with a view to overriding its decision would always be wrecked on the bedrock of Article 75: "A resolution of the Reichstag can be invalidated by popular vote only if the majority of those entitled do actually vote." In Switzerland the effect of the referendum does not depend on the number of voters who take part in it; but to judge from Swiss experience, the above proportion is not likely to be attained too often. This is not, however, the worst. Strange results follow from the clause just quoted, as the following examples will show:

(1) 26 p.c. of the Electorate vote against the decision of the Reichstag, 25 p.c. in its favour. Result: the law is lost.

(2) 49 p.c. vote against the decision of the Reichstag, not one vote is cast in its favour. Result: the law is ratified.

In other words, the surest way to guarantee the success of the law is for the supporters of the parliamentary majority to refrain entirely from voting. If they do no Act of Parliament can ever be defeated unless more than half the voters, not only disapprove of it, but actually vote against it; and subject to the same proviso, it will stand, even though opposed by 60 p.c. of the voters, of whom 80 p.c. record their votes, and vv., or in the face of a 70 p.c. opposition on a 70 p.c. poll. No law could in the circumstances ever be brought to fall unless it were notoriously so unpopular and excited the passions against it with such vehemence that no representative assembly would ever dream of enacting it. If this obvious *reductio ad absurdum* did not occur to the framers of the constitution and escaped the critical eye of its commentators, the inference may safely be

drawn that neither the former nor the latter took the referendum seriously. Altogether it seems to have been incorporated in the Constitution for the sake of its decorative effects rather than for actual use, and in practice the Constitution is after all right if it asserts that "federal laws are enacted by the Reichstag."

When once a law has surmounted all these obstacles, real and imaginary, only formal steps remain to be taken before it becomes operative, and these the President of the Federation is under a constitutional obligation to take. They are comprised under the term promulgation, in the wider sense of the word, but are divided by the Constitution into two stages, authentication and publication, or promulgation in the narrower sense. "The President of the Federation must authenticate all laws constitutionally enacted and must publish them within one month in the Federal Law Gazette." (Art. 70.) The President authenticates a law by signing and dating a copy of it, the Chancellor or one of the Federal Ministers countersigning. By doing so, the President certifies

(1) the textual identity of the copy with the law as enacted by the Reichstag. The form, however, in which it is binding both on the subjects and on the courts is that in which it is published in the Gazette: its wording there is conclusively presumed to be genuine unless and until a correction is published by the competent authorities;

(2) that all constitutional requirements have been fulfilled in the enactment of the law. Since the President is to publish "all laws constitutionally enacted" and these alone, he must satisfy himself on this point before promulgation. Some of the critics of the Constitution, who have imbibed its spirit of distrust, have found it incongruous that this task should have been entrusted to the President of the Federation who has no knowledge, at first hand, of the matters for which he is to vouch; but they have found comfort in the idea that, after all, if in doubt, he can examine and

cross-examine the President of the Reichstag; ministerial counter-signature apparently counts to them for nothing.

The date on which the President authenticates the law is its official date. In strictly logical consistency, since laws are enacted by the Reichstag, they ought to bear the date of their last reading; the actual practice seems to be a monarchical survival. The President must publish the law within a month of the final vote in the Reichstag. He may not publish it before a fortnight has elapsed, so as not to deprive the Reichsrat of its right of protest (Art. 74), unless indeed that body has previously waived its right. There are two exceptions to the main rule:—

(1) Publication must be postponed for two months upon the demand of one-third of the members of the Reichstag (Art. 72), so as to allow the electorate sufficient time to ask for a plebiscite.

(2) In the case of a law passed by a two-thirds' parliamentary majority after the Reichsrat has protested against it, the President is given three months in which to make up his mind whether he will publish it or order a referendum. (Art. 74.)

The enacting clause of a statute usually runs as follows: "The Reichstag has enacted the following law, which is published herewith with the consent of the Reichsrat." Though common form now, this formula is indefensible on constitutional grounds. For, as has been shown, except in the case of certain amendments inserted in finance bills by the Reichstag, the consent of the Reichsrat is never required. It is true, the consent is here said to have been given, not to the law, but to its publication; in fact, it is wanted for the one no more than for the other. The political influence which the Reichsrat actually exercises in legislation may have rendered more acceptable this adaptation of the enacting clause of imperial laws, in the passing of which the Federal Council had been the predominant factor. "Unless they otherwise provide, federal laws come into

operation on the fourteenth day after that on which the Federal Law Gazette is published in the federal capital." (Art. 71.)

The genesis of a German law has now been fully expounded. There remains, however, to be studied a special type of laws, which deserves separate treatment, viz. laws amending the constitution. This topic will prove of particular interest to readers familiar with Dicey's generalisations on federal constitutions, as mainly founded upon that of the United States, since they will discover that the principles of the German federal constitution deviate very widely from the maxims laid down by that author. A preliminary question has to be answered: What is meant by "the constitution" for the amendment of which special provision is made in Article 76? It must be remembered that the republican constitution, as framed in Weimar, is by no means an exhaustive codification of the fundamental laws of the German Federation. Besides the amending statutes since enacted, a good many laws have been, and will yet have to be, passed by the ordinary process of legislation for the regulation of matters specifically left to it by the Constitution: a certain analogy will be discerned to the French distinction between constitutional and organic laws. Laws of the latter class may be amended or repealed in the ordinary course of legislation, as also may be the numerous imperial statutes surviving under the saving clause of Article 178, as being consistent with the Constitution. In fact the stiffer *modus procedendi* prescribed in Article 76 applies only to constitutional law in the formal sense, *i.e.*, to the Weimar Constitution itself and to its amendments.

The leading principle is that "the Constitution can be amended in legislative forms." It can be altered by the same powers by which ordinary laws are enacted, viz. by the real legislator, the Reichstag, and by the legendary legislator, the Electorate; and it can be changed in the ordinary forms of legislation, normally by Act of Parliament, and potentially by plebiscite as well. In particular

(1) German theory does not recognise a special *pouvoir*

constitutif and knows nothing of Constituent Assemblies or Conventions. Indeed, the National Assembly, convened for the special purpose of drawing up a republican constitution, acted simultaneously as the ordinary federal legislature.

(2) Whilst the plebiscite is available for amendments of the constitution to exactly the same extent as for ordinary law-making, the referendum is not, as it is in Switzerland, compulsory for the former. The Weimar draft itself has never been submitted to the popular vote, and the statement in the Preamble that "this Constitution has been framed by the German people," is therefore misleading. It must be remembered, however, that the Preamble is not part of the text of the Constitution and therefore a legitimate field for rhetorical licence. Article 181, which is, accurately expresses the historical truth that the Constitution was framed and enacted by "the German people, through its National Assembly."

(3) Neither in the United States nor in the Swiss Federation could one iota be changed in the Constitution without the consent of the majority of the states or cantons. The German states have no more voice in this matter than in ordinary federal legislation. The Constitution was drafted and enacted by a national organ alone, a temporary Committee of States assisting in a consultative capacity only. And now the states have no means of preventing further encroachments upon the scanty rights still left to them or even complete absorption other than the control which the Reichsrat may exercise on their behalf.

(4) Far less does the German Constitution provide anything in the nature of superconstitutional guarantees, as for instance that enjoyed by the states of the American Union in respect of their equal senatorial representation.

The essential difference between ordinary legislation and amendments of the Constitution is that to effect the latter more substantial majorities are required all round.

(1) In the Reichstag a double two-thirds' majority is insisted upon. "Resolutions of the Reichstag in favour of an amendment of the Constitution are effective only if two-thirds

of the full legal membership are present and at least two-thirds of those present consent thereto."

(2) In the Reichsrat. "Resolutions of the Reichsrat in favour of an amendment of the Constitution likewise require a majority of two-thirds of the votes actually cast." It will be noted that no minimum number is prescribed for the votes represented. Otherwise the text is ambiguous and has given rise to much controvery among writers. It applies undoubtedly

(a) to resolutions of the Reichsrat approving government proposals for changes of the Constitution. But as to these the provision is of no practical value, since legally the government may in any case disregard the views of this body and proceed with its bill all the same, whilst the moral effect of adverse decisions does not depend upon exact numerical ratios;

(b) to resolutions of the Reichsrat in favour of draft-laws of its own to amend the Constitution. In this sense the clause operates as a clog upon the initiative of the Reichsrat.

But how about a resolution to protest against a constitutional change adopted by the Reichstag? This is not a resolution "in favour of an amendment of the constitution" and is not therefore subject to the minimum majority prescribed by the clause. Some authorities are content to state that such a resolution takes effect if passed by a simple majority. Others go further and insist that inasmuch as a resolution not to protest is a resolution in favour of the amendment of the constitution and is therefore inoperative unless passed by a two-thirds' majority, it follows that a resolution to protest must be deemed to be carried as soon as more than a third of the votes present are cast in favour of it; for it cannot be the intention of the legislator that the effect of the vote should be made to depend upon the form of words in which the proposal is clothed. It is not necessary to enter into the further complications of the problem which would arise if the resolution to protest were coupled with alternative proposals of the Reichsrat for altering

the constitution. Similar questions arise in regard to resolutions of the Reichsrat to insist upon an appeal to the people after a constitutional amendment, protested against by this assembly, has been carried for the second time in the Reichstag with the necessary majority.

(3) Of the voters. "In order that a decision of the people in favour of an amendment of the constitution, initiated by petition, become effective, the assent of the majority of those entitled to vote is required." (Art. 76.) The actual assent of the majority of the Electorate is required for such amendments only as are initiated by the people itself. Otherwise it is enough for the majority of the voters to record their votes. (Art. 75.) The ground for the distinction is obvious. The holding of a referendum in the former instance implies that the Reichstag has decided against the change proposed (Art. 73), and a most emphatic assertion of the will of the people is needed to effect the innovation against the wish of Parliament. In all other cases it is Parliament that has resolved upon the alteration of the Constitution, and a plebiscite overriding the decision of the Reichstag merely means the maintenance of the *status quo*.

The only points of difference, then, between effecting alterations of the Constitution and ordinary law-making are

(1) that for the former certain minimum majorities are required, and

(2) that in the former case the Reichsrat can give special weight to its protest by demanding a plebiscite if the Reichstag disregards it.

The chief reasons for providing these additional safeguards for the stability of the Constitution were, on the one hand, the want of a revising chamber that might have prevented rash constitutional innovations, and, on the other, the claim of the states for protection against the free play of centralising and unitarian tendencies. The mere existence of such special conditions, of course, stamps the German Constitution as a rigid one. But a classification in which of the two only groups the one is represented by a single specimen, whilst the other is a general

hold-all, however logical in theory, is of no practical utility. What is far more important is to determine the specific degree of rigidity which the German Constitution exhibits. In an attempt to solve this problem the whole ballast of provisions relating to the referendum may be thrown overboard, since the chances of its being resorted to are very remote and, considering the majorities required to make it effective, its influence upon the course of events would in any case be nil. Again, the Reichsrat owes its influence, great as it is, not so much to its special constitutional powers, since the ultimate sanction of its right of protest, viz. the appeal to the people, cannot easily be applied to any useful end, as to its political position as the champion of state rights. The question therefore turns practically entirely upon the extent to which the freedom of decision of the Reichstag is hampered by the special provisions concerning alterations of the Constitution. Now the insistence upon a two-thirds' quorum, together with a two-thirds' majority, undoubtedly limits its movements to no mean degree, especially so since in the actual state of parties it is no easy matter to attain that relative unity of purpose for any object whatsoever. But the terms seem stiffer than they really are; for after all, four-ninths, *i.e.*, less than one half, of the members of the House, are able to carry through any amendment of the constitution. Nor must it be forgotten that a substantial proportion of German constitutional law is contained in ordinary statutes, which the Reichstag can alter at any time without coming up against those numerical obstacles. But what more than anything else will bring home to the reader the fact that the rigidity of the German constitution is of a comparatively low order, is that conventions have already begun to modify, to quite a respectable extent, the working of the written text—a phenomenon almost unheard of in the case of a federal constitution, but practically unavoidable with a system of parliamentary government.

It is a commonplace of American jurisprudence that it falls within the province of the Courts to pronounce upon the con-

stitutionality of federal laws. The Swiss Federal Constitution (Art. 113) expressly denies that power even to the supreme federal tribunal. The German Constitution is silent. German doctrine, in approaching the question, points out that the word "constitutionality," as applied to laws, is an ambiguous term, and that the problem really involves two independent lines of inquiry, viz.:

(1) Have all the constitutional requirements been complied with in the enactment of the law? *E.g.*, has a law passed by the Reichstag against the protest of the Reichsrat and not submitted to the popular vote, secured, upon reconsideration in Parliament, the necessary proportion of votes? It is here a question of the "formal" legality of a law.

(2) Are the provisions of a statute consistent with the Constitution? What is here considered is the subject-matter of the law, its "material" legality.

The former question seems to answer itself. The courts have no knowledge of, nor the means of acquiring information about, a series of procedural events occurring in Parliament, in the Reichsrat, in a ministerial department, or in the council chamber of the President, upon which the formal constitutionality of a law depends. As regards statutes amending the constitution a further difficulty arises in Germany from the fact that they do not, as a rule, show on the face of them their peculiar character, but are published in exactly the same form as other laws. It is for the legislative factors themselves to make sure at each stage that their every act is in strict conformity with the prescriptions of the Constitution, and that they take no step until they are satisfied that all the necessary preliminary conditions have been fulfilled. They are in this respect both guardians of the Constitution and judges in their own cause. A special obligation, moreover, is imposed upon the President of the Federation and on the countersigning minister before promulgation to ascertain *omnia rite esse acta.*

The publication of the law therefore implies the presidential guarantee of its formal legality and creates a *praesumptio juris et de jure* to that effect binding upon those who are called upon to apply it. And this would be so even though it should turn out that owing to an oversight the procedure had been faulty or defective; for an error of procedure does not of itself void a law. This doctrine, though the prevalent one in German constitutional literature and invariably acted upon in practice, has not gone unchallenged. It has been contended that in the absence of an express constitutional prohibition the right must be conceded to the courts to inquire into the formal constitutionality of a law whenever such independent examination appears necessary to them; that the guarantee of the President is conclusive only for those who are his political inferiors, but not for the judges, who cannot escape responsibility by accepting it; and, finally, that the practice obtaining, whilst entirely justified under a monarchical *régime*, is highly objectionable under a republican form of government, since the word of a President is not received by the people with, nor does it deserve, that confidence willingly accorded to his imperial predecessor. The second question is likewise much disputed. But the weight of authority is in favour of the view that no judge may refuse to apply a federal statute on the ground that it is inconsistent with the Constitution, and certainly no tribunal in Germany has ever dreamt of questioning the constitutionality of a federal enactment. German theory and practice are not, however, based on the principle of the separation of powers, as are the Belgian and French. They are founded on two different, though closely allied, grounds, viz.:

(1) the supremacy of Parliament, which could not allow any of its acts to be called into question in a court of law;

(2) the non-existence of a *pouvoir constitutif*, as distinct from the ordinary power of legislation. Since both constitutional and ordinary laws are acts of Parliament, and nothing else, neither of them can claim superior validity. It is true, it has been thought ad-

> visable to secure for certain legislative enactments a greater measure of stability and durability by increasing the difficulties of their amendment. But greater durability does not import superior sanctity. Both alike emanate from the same power in the state and are therefore entitled to be treated with equal respect by the judges. The equality shown in the identity in the form of their publication would itself create obstacles to attempts at discrimination. Indeed, when it becomes necessary to give preferential treatment to the one or the other, it will in general be the ordinary law that will prevail, according to the principle of the *lex posterior:* Whenever confronted with two conflicting statutes, the courts must presume that the legislature has changed its mind; it will then be their duty to give effect to the latest manifestation of its will and to hold the earlier law to be *pro tanto* repealed.

No account of German legislation would be complete without some reference being made to Ordinances. This topic occupies an inordinately large place in German constitutional literature, and the manner in which it is treated would suggest that it is one of the most knotty problems in German public law. Yet the underlying ideas are transparent enough, and the substance of most of this curious learning may be reduced to a few simple propositions. To understand it the reader must take note of a marked difference in the technique of law-making between English and continental practice. A British Act of Parliament seeks to regulate all the *minutiae* of its subject-matter. In continental states a statute, as a rule, merely lays down the leading principles, thus providing a frame-work to be filled in by some public authority other than Parliament. The French speak of secondary legislation and look upon it as the function of a special *pouvoir réglémentaire,* residing in the President of the Republic. In Switzerland it is vested in the Federal

Council. In Germany no single organ of government is entrusted with the task of issuing ordinances, of which two kinds are distinguished, corresponding loosely to the French *décrets réglémentaires* or *généraux* and *décrets administratifs* respectively.

(1) Legal Ordinances contain rules of law binding upon the subject and must therefore be published in the Federal Law Gazette in exactly the same way as laws proper, from which they differ only in this single respect that they are not enacted by the legislature. The German Federal Constitution refuses to recognize any power in the state competent of itself to issue such ordinances and strictly adheres to the maxim that to make laws, under whatever name, falls within the exclusive province of Parliament. Parliament may, however, delegate its powers, and only in virtue of such delegation is secondary legislation permissible. Nor may this power be delegated *generaliter* or once and for all; each single statute must specifically authorise some named organ to make the detailed legal rules necessary for its execution. This principle has been fully established and has always been acted upon ever since the Imperial Constitution of 1871 first came into operation. If even modern writers insist upon it with the greatest emphasis, the reason is that up to the time of the revolution the theory and practice of some of the most important German states deviated widely from those federal constitutional maxims. The Federal Government has most frequently been chosen for the task, the consent of some other organ or committee being, however, required in many cases; on rarer occasions the President of the Federation, or the Reichsrat; and in some instances the states. It is noteworthy that the ordinances issued by the latter in their character of subordinate federal law-making bodies are laws of a higher order than any enacted by them in the exercise of their autonomous powers and override even the articles of their constitutions.

(2) Administrative Ordinances are regulations for the conduct of the administration. They are addressed to government

departments and are binding upon the members of the official hierarchy, not on the public at large. They do not create fresh law, but are themselves both founded upon and limited by existing law. The power to issue such regulations for the execution of a federal law is conferred sometimes on the President of the Federation, sometimes on the Federal Chancellor or a Federal Minister, in other cases on the Reichsrat, or on some government department, or on the state governments. In the absence of special provision the Constitution (Art. 77) vests it in the Federal Government in its corporate capacity, subject, however, to the consent of the Reichsrat in those cases in which the execution is left to the state authorities.

For the sake of practical convenience statutes often confer upon the same person, or body of persons, authority to issue the necessary ordinances of either kind.

CHAPTER X.

ADMINISTRATION OF JUSTICE

"The ordinary jurisdiction is exercised by the Reichsgericht and by the Courts of the States." (Art. 103.) Whilst the ordinary law of the land to be administered by the courts, the rules of procedure in civil and criminal causes, and the provisions as to the organisation of the courts have long since been codified on a uniform basis for the whole of the Federation, the administration of justice substantially remains with the states and forms indeed the most important government task left to them. Yet even here the centripetal tendency characteristic of German federalism is noticeable. For in order to ensure uniformity in the interpretation of law, a Supreme Court of Judicature has been established, the Reichsgericht in Leipzig, as a final court of appeal, both civil and criminal, from the High Courts of the states. It also had, from the first, original jurisdiction in cases of treason. Recent legislation has conferred further powers upon it. A federal law of 8th April, 1920, designates it as the court competent, in accordance with Article 13 of the Constitution, to decide whether a state law conflicts with federal law. The validity of a state law, in so far as rights and duties depend upon it, could of course always be called into question, as a point relevant to the issue, in the course of a trial or of a prosecution, and the regular courts would pronounce upon it. But such a decision, whilst conclusive as between the parties, would have no force beyond the case actually *sub judice*. The tribunals can refuse to apply a state law which they deem incompatible with federal law, but they cannot abrogate it. The jurisdiction conferred by Article 13 is of much wider scope. Under its provisions the question may be adjudicated upon as an independent issue at the instance of

either the federal government or of a state government as soon as a mere doubt or difference of opinion arises. Moreover, the Reichsgericht is invested with the power of authoritative interpretation; its decisions are published in the Federal Law Gazette and obtain the force of law. What further deserves attention is that it is always the state law which stands in the dock; no authority is conferred upon the court to inquire into the constitutional validity of the federal law with which the former is alleged to conflict. The jurisdiction, however, which has rendered English readers familiar with the existence of the Reichsgericht is that conferred upon it by a federal statute of 18th December, 1919, viz., that over war criminals, according to Articles 228-232 of the Peace Treaty of Versailles.

The Constitution declares all judges to be independent and to be subject to the law only. (Art. 102.) An additional safeguard is provided for the independence of the judges of the ordinary courts by the rule that they must be appointed for life, subject to such age limits as the legislatures may appoint. No such judge may be transferred to another post against his will, nor may he be compulsorily suspended from the exercise of his office or retired, except

(1) in virtue of a judicial decision and on grounds and in forms prescribed by law, or

(2) if a change in the organisation of the courts or of their jurisdictional areas renders such a step necessary, and in this instance only on full pay. (Art. 104.)

Among extraordinary federal courts may be mentioned in passing

(1) Consular courts, which are federal because the Federation alone can enter into relations with foreign states (Art. 78) and therefore appoint consular officers.

(2) Courts-martial constituted by decree of the President of the Federation in areas as regards which he has proclaimed a state of siege in virtue of the powers vested in him by Article 48.

(3) Military courts, which may henceforth be set up only in war-time or for the trial of offences committed aboard men-

of-war in actual commission (law of 17th August, 1920, concerning military jurisdiction, giving effect to Art. 106 of the Constitution).

Of far greater importance are the Federal Administrative Courts. Courts for hearing complaints about special classes of administrative acts have long existed in the States and in the Federation, *e.g.*, the Federal Insurance Office, the Patent Office, the Poor Law Settlement Office, the Supreme Finance Court. Now the Constitution prescribes the formation of courts of general jurisdiction over administrative causes both in the Federation and in those states in which they do not already exist, "for the protection of the individual against orders and decrees of the Executive." (Art. 107.) German constitutional writers see in this clause the final triumph of the supremacy of the law. They explain the necessity of setting up special tribunals for the settlement of such disputes by pointing out that administrative law has grown to such dimensions that ordinary judges could not possibly master its intricacies. They are obviously quite unaware of the fact that the mere existence of such a body of laws is the very negation of the rule of law, as understood in Anglo-Saxon jurisprudence. It cannot be denied that the system here foreshadowed—the Federal Administrative Court has not yet been established—under which complaints are adjudicated upon in accordance with a pre-established body of rules, means a huge advance upon the order of things previously prevailing, which left the subject, body and soul, to the tender mercies of the bureaucracy. Yet though the administrative tribunals are modelled on the law-courts and though they try causes in quasi-processual forms, the word Courts, if applied to them, is a misnomer, and the older terminology according to which they were spoken of as Insurance Office, Patent Office, &c., expresses with more truth their real character. For their so-called judges are civil servants or, at the best, a mixed body of officials and lawyers.

A similar defect attaches to the Tribunal for Disputed Elections in connection with the Reichstag. (Art. 31.) It

was set up with the avowed object that the trials should be conducted in an atmosphere of judicial impartiality and free from those political influences which were bound to prove powerful, if not preponderating, as long as this jurisdiction was exercised by Parliament or by a parliamentary committee. But to what extent will that aim be realised with a bench composed of three members of the Reichstag and only two judicial members, these latter themselves being not common law judges, but judges of the Federal Administrative Court? The preliminary inquiries are conducted by a Federal Commissioner appointed by the President of the Federation. The grounds on which an election may be attacked are

(1) Formal or procedural irregularities at an election.

(2) Electoral offences, these being of two kinds

(a) statutory.

(b) parliamentary, i.e. established by parliamentary precedent and practice.

It is not, however, sufficient that the alleged irregularity or offence be proved to the satisfaction of the court; the latter will give an adverse verdict only if it finds that the result has been vitiated thereby. In most countries the effect of an unfavourable decision is the same as in England; the return is altered, the candidate who has obtained the next highest number of votes taking the seat. Not so in Germany, which herein follows French practice: the tenour of the judgment is that the election is invalid, i.e. it is quashed, and a fresh election is held.

"A State Court for the German Federation will be established by a federal law." (Art. 108.) Apart from the minor task of settling conflicting claims to property as between two states in cases of territorial rearrangements (Art. 18), this court is entrusted by the Constitution with adjudication upon two different sets of causes.

I. Disputes in the sphere of public law. In this aspect it supplies the last link in the chain of jurisdictions and has for its prototype the Swiss Federal Tribunal, as originally established; through successive accretions the latter court has

acquired a jurisdiction of the most variegated pattern and now discharges the functions of a state court through one of its divisions only. The German Court is competent to decide

(1) according to Article 19,

(a) constitutional conflicts arising within a state in which no court exists for their decision. The duties of the federal court under this heading are not likely to be onerous, since the more important states have set up state courts of their own.

(b) disputes "outside the domain of private law" between different states, or between a state and the Federation, provided that no other federal court is competent to deal with them. By the words between inverted commas the competence of the ordinary courts in matters of private law as between two states, or between a state and the Federation, is impliedly recognised.

It will be noted that the jurisdiction conferred by this article is of a subsidiary character and to be exercised only in the absence of another court competent to deal with the subject in dispute. For instance, a decision whether a state law conflicts with federal law has to be obtained, as shown above, from the Reichsgericht, and not from the Federal State Court.

(2) under the provisions of Article 15, whether the federal government is right in finding fault with the manner in which a federal law is executed by a state. A mere difference of opinion is sufficient to found jurisdiction; and inasmuch as such a difference is at least as likely to turn upon considerations of expediency as upon questions of strict legality, a task is here imposed upon the State Court to which courts of law do not generally feel equal. However, it will presently be seen that the legislature has apparently taken the hint, when settling the constitution of this tribunal.

II. Trial of impeachments. According to the English view, impeachment means the prosecution of an offender by the Lower

House before the Upper House. For the purposes of comparative politics this definition is too narrow. For whilst it is true that a good many countries closely follow the English practice, there are not a few others, such as Holland, Belgium, Denmark, Sweden, and Norway, where the trial is held before a regular court, generally the supreme court of the state. In the instances just mentioned there was no compelling necessity for such choice. In the case of Switzerland and in that of Germany it was unavoidable: in the former because there the proceedings are instituted, not by the popular chamber alone, but by the Federal Assembly, *i.e.*, the two Houses in joint session; in Germany owing to the absence of a second chamber. "The Reichstag may impeach the President of the Federation, the Federal Chancellor, and the Federal Ministers before the State Court for the German Federation for culpable violation of the federal constitution or of a federal law." (Art. 59.) The Constitution thus strictly circumscribes

(1) the body of persons liable to impeachment. In some states the lower chamber is given an entirely free hand; in others, as for instance in the United States, "all civil officers," at any rate, are included. In Germany no one can be proceeded against but the persons named in the text. The circle is, however, somewhat more widely drawn than the wording of the clause would at first sight suggest. For the federal law of 9th July, 1921, by which the State Court was established, speaks of it, in paragraph 2, as the tribunal competent to try on impeachment Presidents, Chancellors, and Federal Ministers; and since there can be but one Federal President and one Federal Chancellor at the time, it follows from the use of the plural number that the President and the Chancellor, and by analogy that the Federal Ministers, may be impeached, not only whilst in office, but also when *functi officio*.

(2) the grounds upon which an impeachment may be founded.

> There is no room in Germany for such elastic charges as "endangering the security of the state or the common weal," nor for relying upon offences as vague as "high crimes and misdemeanours." Nothing will do but the definite violation of a definite article of the constitution or of a definite law; in other words, the act or omission must be clearly unlawful, though not neccessarily criminal. On the other hand, it is not required, as it is *e.g.* in France, that the wrong has been committed by the accused persons "dans l'exercice de leurs fonctions."

"The bill of impeachment must be signed by at least one hundred members of the Reichstag and must be carried by the majority prescribed for amendments of the constitution. The details will be regulated by the federal law concerning the State Court." (Art. 59.) The Constitution thus requires that the motion to be even discussed must be supported by at least one hundred members and in order that it may be acted upon, two-thirds of the full membership of the Reichstag must be present and two-thirds of those present must vote for it. No other legal provision exists, as in some countries, *e.g.*, Holland, to regulate the procedure in the formulation of the charge; and the Statute above quoted leaves it to the House to conduct the case through managers appointed from among its own members or to entrust with the task an independent statesman or politician or the public prosecutor. Again, the Reichstag is at liberty at any time to withdraw the charge, and want of prosecution amounts to constructive withdrawal. Just as in this country, proceedings on an impeachment are unaffected by a prorogation or a dissolution. In England and in most other states impeachment is an avowedly criminal proceeding, and the court upon conviction awards either such punishment as is prescribed by the penal code for the offence in question, or arbitrary punishment in the exercise of its own unfettered discretion. Not so in the United States: here the trial is not criminal in character, but *sui generis*. For it is provided by

the Constitution that "judgment in cases of impeachment shall not extend further than the removal from office, and disqualification to hold and enjoy any office of honour, trust or profit under the United States; but the party convicted shall nevertheless be liable to indictment, trial, judgment and punishment according to the law." Germany has copied the American rather than the British model. Here too impeachment is no bar to a subsequent conviction by a criminal court, and the punishments which the State Court may award are practically identical with those on impeachment under the United States constitution, viz. deprivation of office and disqualification for office, either for a term or for life. Whilst in America, however, the accused, if found guilty, "*shall*" be removed from office, the German court may stop short of passing sentence and limit itself to delivering judgment to the effect that the charge has, or has not, been established. The discretion so vested in the tribunal is strongly reminiscent of the English practice, according to which, after a verdict of guilty has been found, the Lords do not pronounce sentence unless the Commons demand it, and goes far to show that an impeachment, though in form a judicial proceeding, is yet in its true nature a political trial, the underlying motive being to discredit a statesman and to bring his political career to an end. In Germany, as in the States, no person can be convicted without the concurrence of two-thirds of the members of the court. The German statute has carried the doctrine that an impeachment is a constitutional, and not a criminal, proceeding, to its logical conclusions: it provides that the accused may not be taken into custody; that insanity is no defence; and that the President of the Federation cannot in this instance exercise the prerogative of pardon without the consent of the Reichstag.

The State Court, as established by a federal law of 9th July, 1921, is not a permanent tribunal, but a court to be formed as occasion requires. Its organisation varies with the nature of the business in hand.

(1) For the decision of matters of public law a bench of

seven judges is formed in connection with the Federal Administrative Court, the President of which acts as the presiding judge, this court and the Reichsgericht supplying three each of the six remaining judges. The prevalence of the administrative factor appears justified since this tribunal is called upon to settle questions of political expediency, as well as disputes of a purely legal character.

(2) For the trial of impeachments the court is attached to the Reichsgericht and is composed of

(a) five legal members, viz. the President of the Reichsgericht, three persons holding high judicial office in the states, and a German barrister;

(b) ten "assessors," five elected by the Reichstag and five by the Reichsrat.

The political character of these trials once again becomes apparent and all the more striking when it is remembered that for a conviction a two-thirds' majority is required and sufficient, so that the ten political nominees, if unanimous, can carry the day against the five embodiments of judicial impartiality. It is difficult therefore to understand the extreme coyness which the legislator displayed in disqualifying for membership of the court practically everybody engaged in practical politics both in the Federation and in the States. The exclusion of members of the Reichstag and of the Federal Government may be accounted for by the fact that it must have appeared undesirable and unfair that the prosecutors should act, at the same time, as judges, though no hesitation was shown in assigning their appointees a substantial share in the composition of the court. For the elimination of members of the Reichsrat, the Federal Economic Council, the State governments and the State parliaments no reason can be discovered unless it be that all these persons, having had conferred upon them by the Constitution the parliamentary privileges enjoyed by members of the Reichstag, must submit to the corresponding disabilities too.

"Exceptional courts are forbidden. No one may be with-

drawn from his lawful judge." (Art. 105.) The two propositions express the same idea from two different points of view. Exceptional courts are courts specially set up for the trial of a single cause. No court, then, may administer justice but those lawfully established according to their respective jurisdictions. And the individual has a claim to be tried by the court generically competent to adjudicate upon causes of the class to which his own belongs.

"Military courts of honour are abolished," as being subservient to the code of honour of a privileged class and therefore not to be tolerated in a strictly democratic commonwealth, and also as perpetuating the practice of duelling which has long been condemned, by the more enlightened sections of the population, as a relic of a barbarous age.

CHAPTER XI.

FUNDAMENTAL RIGHTS.

Fundamental rights belong both historically and notionally to the era following the fall of absolute monarchy. No longer was the subject to be left, unarmed and defenceless, to the tender mercies of an arbitrary government. Limits were to be set to the omnipotence of the state, by assigning to the individual spheres within which it was free to move, in complete independence, immune from all official interference. Rights were vested in the citizen which he could assert, not only against his fellow-citizens, but also against the state, and if it came to be a case of The Individual v. The State, as far as their protection extended, he could meet the organs of public power on a footing of perfect equality. It makes little difference for present purposes whether these liberties are conceived as *droits de l'homme* or as *droits du citoyen*, as an inalienable heritage belonging to man under the dispensation of the law of nature, as in the *déclaration* of 1789, or as originating in a constitutional grant, i.e. in positive law, as for the first time in the *charte constitutionelle* of Louis XVIII. of 1814, where they are treated under the significant heading "Droit public des Français." It was from the latter source that fundamental rights passed into most continental and many of the American constitutions, either directly or through the medium of the chapter "Des droits des Belges" in the constitution of 1830. Well might analytical jurisprudence convincingly demonstrate that there can be no rights against the state; its teaching did not influence the practice of constitution-makers. The doctrine of the rule of law, as understood in continental countries, had first to be fully evolved before the subject was seen in a new

light. To the principle of absolutism according to which *raison d'état* is a sufficient justification for every act of government, succeeded first the rule that the prerogative is limited by law, and finally the postulate that there is no room at all for a free and unfettered discretion, but that every power exercised by the executive must be authorised by law. With this maxim the theory of fundamental rights was absolutely incompatible. The onus, as it were, had shifted. Instead of the citizen being called upon to defend himself against administrative interference by alleging and proving a specific right, the administration had now to rely on a legal title for every power which it claimed. The protection of the individual lies no longer in subjective rights, but objectively in the supremacy of the law. This doctrine had conquered the schools, though it had by no means been adopted yet as a universal rule of practice, when both Germany and France were confronted with the task of framing new constitutions, and in neither the imperial constitution of 1871 nor in the republican constitution of 1875 have fundamental rights been included. How is it then that the ghost that seemed to have been laid, has come to life again at Weimar?

Both the Prussian and the government drafts contained short sections entitled "The fundamental rights of the German people," in which the traditional catalogue was more or less faithfully reproduced. When the subject came up for discussion in the National Assembly, opinions were divided. A minority wished to do away with them altogether, as being but a compound of "declarations and declamations," with a few rules of law thrown in. Even those who had set their hearts most resolutely on their retention acknowledged that no useful purpose would be served by dishing up "monuments of archaic law, fit only for a museum." These were to be replaced by fundamental rights of an entirely new order, the *ensemble* of which should form "a public confession of faith as to the direction in which the new German state meant to move in the stress of the social problem." The consideration which in

the end proved decisive for their inclusion was a political one, viz. the desire to counteract, as far as possible, the effects of war propaganda which had represented the German nation as a race of barbarians, by exhibiting before the world at large a miniature picture of German civilisation, as reflected in the mirror of German law. Dr. Naumann, the protagonist in the battle, urged that the fundamental rights, instead of being clothed in dry legal technical language, should be reduced to the form of political aphorisms, in the hope that this part of the constitution would become "the German people's political bible, a primer of German public law." He himself had coined a number of political proverbs, of which the following two may serve as specimens: "Every German is a priceless national possession, as long as he proves worthy of his people," "A plentiful offspring spells a strong nation." A semi-forensic gown was, however, preferred to this homely garment, and Dr. Beyerle was entrusted with the task of preparing a draft, which was to contain "a distillate of the present state of the law, together with a programme of future legal development." Native models for such a combination were not wanting. Both the German federal constitution of 1849, as drawn up in St. Paul's Church in Frankfort, and the Prussian constitutions of 1848 and 1850 lay down, under the heading of fundamental rights, not only rules of law answering that description, but also principles of legislation, intended to give effect, both in the political and in the economic sphere, to the liberal ideas then everywhere triumphant.

The function of these fundamental rights, as defined by the Committee on the Constitution, is "to supply standards and prescribe limits for the legislature, the executive, and the administration of justice, both in the federation and in the states." But a number of other ends was to be served at the same time. Their educational value was never lost sight of. They were to form the groundwork of instruction in politics and civics. The members of the National Assembly realised how much the German people was wanting in knowledge of these

subjects. Hence they were made compulsory in all schools, and it was further provided that a copy of the constitution is to be handed to each pupil on leaving school. (Art. 148.) The pedagogic aim explains the inclusion of much that would otherwise be out of place in a constitution, and also largely the form in which the subject-matter is presented. For the fundamental rights were to be "not only bricks in the building, but the bread of life of the constitution." They were intended "to sink deeply into the soul of the nation and had therefore to offer more than dry paragraphs." Hence "all the ethos and all the pathos" which makes of this chapter "*une idéologie ténébreuse*," as which Napoleon described fundamental rights.

The popular appeal which the second principal part is to make, renders somewhat hazardous the juxtaposition of rules of positive law and of directions to the future legislator. A proposal to indicate in the constitution those clauses meant to be immediately operative, was rejected as "barren" in the National Assembly. A trained lawyer would have considerable difficulty if he attempted to single them out. The man in the street will never realise the difference when both are included under the same common appellation and will feel that he has been cheated out of his "fundamental rights" when he discovers, to his detriment, the divergence between theory and practice. But even if they were seen in their true light, all these promises would be bound to prove mischievous. The chapter on fundamental rights, a modern reproduction of the vessel of Pandora, contains indeed prospective gifts for everybody who cares to ask, now for the civil servant, and now for the workman, now for the proletariate, and now for the sorely tried middle classes. The long time required to bestow all these legislative blessings would of itself test to the utmost the patience of the intended donees. But many of these drafts on the future are bound to be dishonoured in the impoverished state of the German exchequer. Besides, some of the promises are ambiguous and, presumably of set purpose, vague; others

give the impression of being made with mental reservations and with no serious intention of ultimate fulfilment. As has been said, the constitution cannot be understood properly without the art of reading between the lines. But the popular mind is unsophisticated and in danger of being poisoned by disillusionment and disappointed hopes. In this sense Taine's dictum that fundamental rights are daggers pointed at human society, is not so wide of the mark.

A further reason for the inclusion of legislative principles was the wish to perpetuate the ideals of the National Assembly and to safeguard its programme from the influence of changes in the political constellation. It was justly apprehended that the moderation and the constant readiness to compromise which characterised its deliberations, could not be relied upon to guide all future parliaments, and the desire to render the principles agreed upon proof alike against the onslaughts of reactionary or communistic majorities is therefore quite intelligible. But all this does not alter the fact that attempts to tie the hands of future generations are doomed to prove either fruitless or harmful. In the present instance the mistake was all the greater since periods of political fermentation and of violent upheaval are not the proper moment for dictating to posterity. In any case, these broad maxims have the further drawback that it is quite impossible to say beforehand whither they will lead, when worked out in all their implications.

According to Dr. Beyerle, who is largely responsible for their actual formulation, the fundamental rights of the German constitution are based on the principles of liberty and equality. The third member of the triad will be missed. It is not really wanting: only that fraternity is replaced by comradeship, if this term is given its socialistic flavour. Whilst the fundamental rights of the traditional order are all individualistic in character and are rights against the state, the Weimar constitution has added an entirely new type, social in scope and availing, not against the state, but against certain social groups. For, as was stated in the National Assembly, "the citizen must

be secured protection, not only against the state, but also against other social powers, sometimes more formidable than the state itself." The point of the passage is, of course, directed, in the first instance, against capitalism, the abuses of which the constitution bravely strives to curb. But not against capitalism alone; the bureaucracy, for example, was in Germany an *imperium in imperio,* and the reminder in Article 130 that "officials are servants of the community," was by no means unnecessary. Other rights were inspired by an outlook social in this sense that some classes of society were thought to stand in need of, and were given, special protection, e.g. the young, the working classes, the middle classes. Socialism, whilst its influence was undoubtedly great, did not, however, have the field all to itself. All parties made their contributions to this chapter, and the desire to please everybody led to the indiscriminate inclusion of the favourite planks in their respective platforms, with the result that the second principal part became what has been ironically called "an interfractional party programme." Too many clauses betray at the first glance that they were born of compromises. *E.g.*, "Property is guaranteed by the constitution. The content and limits of the right of property are defined by the laws." (Art. 153.) The first proposition is a curtsey to the established economic order; the second authorises the socialistic legislator *ad libitum* to restrict the extent, and to exhaust the content, of the right. Again, every church "orders and administers its affairs independently, within the limits of the law applicable to all" (Art. 137); but churches "that were hitherto public corporations continue as such" (*ibid.*) and are therefore subject to special restrictions and to a certain measure of state control in the management of their affairs. An expedient frequently adopted in order to arrive at a formula to which men of every shade of political opinion could subscribe, was to guarantee a right "in accordance with the provisions of the laws." But problems which await solution are not really advanced by resorting to a set of words to which everybody can render lip service, and constitu-

tional maxims which were intended to guide and to bind the future legislator, thus become as clay in his hands. In such circumstances it is hardly surprising that the chapter on fundamental rights is full of contradictions and replete with provisions entirely meaningless, and well might a member of the National Assembly predict that it would prove "a source of legal confusion rather than a source of law."

The sources from which the materials for this chapter were collected, are manifold. A good deal is borrowed from foreign models, or rather from their adaptations in the older constitutions of the German states and especially in the Frankfort draft of 1849. Party programmes, as has just been mentioned, were laid under contribution. Some provisions were transferred, literally or with slight modifications, from the German codes. There is no doubt that the Committee was largely influenced by Dr. Naumann's proposals, nor was it at all averse to receiving suggestions from private people. The inspiration coming from so many different quarters, and so many purposes having to be served at the same time, it is easy to understand how this part of the constitution came to contain a miscellaneous assortment of goods. The liberal reception of legal antiquities, pronounced useless by the Committee itself, is particularly striking. The manner in which they are placed side by side with clauses embodying the fulfilment of the most modern aspirations is illustrated in the opening sentences of the chapter: "All Germans are equal before the law. Men and women have in principle the same political rights and duties." (Art. 109.) It was done for the sake of completeness; for, of course, in the compilation of a text-book nothing must be omitted that is relevant to the subject. But it was forgotten how much such a presentation must detract from the value of the volume as an instrument of propaganda. The foreign reader, when again and again running up against maxims which have long been constitutional commonplaces in all countries within the pale of Western civilisation, will hardly suspect that the saints of Weimar were preaching with more or less pathos

to the converted, but will naturally conclude that German public law and German political life were, up to the foundation of the republic, even more behind the times than appearances would have suggested. Where ordinary legal provisions, long in force, were thus given a place in the constitution, the reason given was reinforced by the desire to ensure their permanence. But it cannot be said that the selection was made with great wisdom. The risk must be very remote of the ordinary legislator wishing to repeal such a rule as that of Article 116 that "no one may be punished for an act unless such act was legally punishable at the time when it was committed," whilst the moment was surely badly chosen for reaffirming, as a constitutional principle, paragraph 9 of the Criminal Code that "no German may be extradited to a foreign government for trial or punishment," when Germany had just agreed to deliver up war criminals upon the demand of the allied powers.

The provisions included under the heading of fundamental rights may be classified as follows:

(1) Rules of positive law, which confer upon the citizen rights enforceable at his discretion; *e.g.*, "transactions against public morals are void." (Art. 152.)

(2) Rules of public law to guide and restrain the activities of the executive for the benefit of the subject. In the parlance of German jurisprudence such rules create merely objective law, but confer no subjective rights, *i.e.*, no rights which the subject can enforce. In other words, the obligations which they impose are duties to the state, and not to the individual, the latter basking only in the reflected sunshine. As an instance may be quoted Article 140: "Members of the defence force are to be given the necessary leave for the performance of their religious duties." Directions of this kind are addressed in the constitution, not only to the administrative organs of the federation and of the states, but even to communal authorities.

(3) Principles to guide and restrain future legislation. It is by no means always clear from the wording whether a clause belongs to this class or is intended to be immediately operative.

Sometimes the vagueness of the language points to the need of supplementary legislation, *e.g.*, "large families have a claim to compensatory advantages." (Art. 119.) It is not only the federal legislator that receives directions; frequently they are addressed to the state legislatures, and more than one maxim has been inserted in order to prevent parliamentary majorities in the states from carrying into effect the more extreme parts of their political programme.

(4) "General truths," as they were called in the National Assembly, in reality moral precepts, occasionally with a touch of class morality, prescriptions which, as already Hamilton remarked, "would sound much better in a treatise of ethics than in the constitution of a government." *E.g.*, "Every German is under a moral obligation, without prejudice to his personal liberty, to exercise his mental and physical powers in such a way as the welfare of the community requires." (Art. 163.)

(5) Mere rhetoric, as for example Article 119: "Marriage, as being the basis of family life and the fundamental condition for the preservation and increase of the nation, is under the special protection of the constitution." Or is the article propagandist in tendency and meant to traverse the war-time news that Germany, owing to her terrific losses in males and in order to please her Turkish ally, intended to legalise polygamy? The design to abolish marriage and to enforce promiscuity was imputed to Soviet Russia, but never, even by The Times, to the fatherland.

The important question arises how the constitutional guarantee of all these fundamental rights is rendered effective. The problem offers no difficulties as regards either the first group of rights, which are enforceable by ordinary judicial proceedings, or the last two classes, which are avowedly non-legal in character. But how if the legislator derogates from the rights of the citizen by enacting a statute that is inconsistent with a legislative principle laid down in the constitution? A distinction must be drawn between a federal and a state law.

As against the former the individual is unprotected. For an act of the federal parliament, as was shown in an earlier part of this book, cannot be called into question in any court of law. It is otherwise with the infringement of a principle of the federal constitution by a state legislature. The validity of such an enactment may be tested as a fact relevant to the issue in an action-at-law, and the judge is bound to pronounce against it if he finds that it conflicts with a rule of the federal constitution, on the principle of Article 13 that "federal law overrides state law." The private citizen may not, however, raise the question as an independent issue, this being a privilege limited by the terms of the article to the federal government and to the ministries of the states. There remains to be considered the most important group of rights, viz. those intended to safeguard the subject against excesses of the executive. All hopes seem to be centred on the promise of Article 107, which makes compulsory the establishment of administrative courts for the very purpose of protecting "the individual against orders and decrees of the administrative authorities." It will be noted, however, that there is nothing in this clause to raise to a higher plane constitutional rights as compared with those flowing from the ordinary law of the land. And since a proposal that proceedings in the administrative court should lie, at the suit of the prejudiced party, for the violation of any fundamental right, was negatived in the National Assembly, the conclusion seems unavoidable that the protection of the article is intended to be available only in respect of certain classes of rights to be specifically defined in the statute by which the administrative court of the federation will be set up. Again, the article speaks only of "orders and decrees" of the administrative authorities; how about acts which are neither the one nor the other? Here nothing is left to the citizen but to fall back upon the old expedient of complaining about the conduct of the offending official to his bureaucratic superior; and if he fails, as he probably will, to obtain satisfaction, the *ultima ratio* is to

petition parliament. All these resources have been exhausted in other countries too, with what results, in France for instance, may be gathered from the judgment of Professor Lebon, who writes: "To recognise rights either in a declaration or in a constitution is not the best way of safeguarding them. Some time ago, besides appeals to the *conseil d'état*"—the French equivalent to the prospective German supreme administrative tribunal —"the right to petition the chambers was looked upon as the most effective protection of the rights of the individual. It is less and less resorted to as a means of guaranteeing these rights. Indeed, it may be said that nowadays they find their best defence in the press." In other words, fundamental rights are largely *iura sine remedio* and have to rely for their protection in the main on public opinion.

By the side of fundamental rights are found fundamental duties. German authors assert that this is the first attempt ever made in a constitution to evolve a system of obligations, and one of them, at least, waxes enthusiastic about this noble manifestation of national character, which never allows a German to assert his rights without at the same time making full acknowledgment of his duties. The claim to originality is ill-founded. For declarations of duties as well as of rights are contained in the French constitutions of 1793 and of the year III, and in the introduction to that of 1848 a theory of rights and duties is expounded. Moreover, to speak of a "system" of obligations in the case of the German constitution is a gross exaggeration, when the most fundamental of all of them, viz. the primary duties of loyalty and obedience, are never even mentioned. For once the text-book writers of Weimar have taken something for granted, but the list looks all the poorer for it. Ethical precepts are found therein, such as the duty to work (Art. 163) already mentioned, the sententious statement that property entails responsibilities (Art. 153), the duty which the landowner owes to the community to till or otherwise to use his soil (Art. 155); again, elementary obligations which hardly require a constitutional sanction in order to

ensure their fulfilment, as the duty of parents to rear their offspring, expressed in rather bombastic language (Art. 120), and to send their children to school (Art. 165); then the duty of the citizen to accept honorary public office (Art. 132) and to render personal services to the state (Art. 133), which will be given ungrudgingly now that the most burdensome of them, viz. compulsory military service, has been abolished. It is questionable whether any of these duties are really worth mentioning in a constitution. But perhaps it was good policy to draw attention to the necessity of taxation (Art. 134); a generation that has this duty impressed upon their minds from youth onwards may grumble less when called upon to shoulder that burden.

It is a moot point whether the fundamental rights of the constitution belong to German nationals alone. Some authors maintain that foreigners, whilst on German soil, must rely for the protection of their rights upon the recognised rules of international law, which, under the provision of Article 4, are deemed to form part of German federal law, and upon special treaty-rights, if any. They consider that the heading of the second principal part of the constitution, " Fundamental rights and duties of Germans " is conclusive. But in the light of the history of the subject it cannot be conceded that this form of words necessarily compels the narrower interpretation. In their choice the German constitution only follows the universal practice adopted ever since 1814, when the term " Droit public des Français " replaced in the French constitution the earlier " Droits de l'homme et du citoyen." The change in phraseology merely indicated a breaking away from the conception of fundamental rights as flowing from the law of nature and was intended to point out that they are a gift of the constitution of the state. Another reason advanced for the exclusion of foreigners from their benefit is the coupling, in the constitution, of rights with duties. It is argued that inasmuch as the obligations imposed by the constitution are not binding on them, they cannot be meant to enjoy the rights which it confers, either.

The analogy is certainly suggestive, but it would not be absolutely convincing even if the facts upon which the reasoning is based were quite true. But they are not; *e.g.*, aliens domiciled in Germany or resident during a certain part of the year are liable to pay taxes. The contrary view is based upon the modern constitutional doctrine according to which fundamental rights are not subjective rights, not rights of the individuall against the state, but benefits accruing to him from the operation of objective rules of law. The constitutional checks on the activities of the organs of the state, of necessity, prevent unwarranted interferences with the foreigner no less than with the German citizen, and the former cannot fail to be protected by them in exactly the same way as he is by the provisions of the civil and criminal codes. In other words, fundamental rights, being merely one aspect of the supremacy of the law, are territorial, not personal, in scope. It seems that the question cannot be answered with a monosyllable. In exceptional cases the constitution extends the benefit of a right, as to freedom of worship (Art. 135), in express terms to "all inhabitants of the federation." In others the language is so broad that the same intention must be inferred, *e.g.*, "Personal freedom is inviolable." (Art. 114.) But even if the right is limited in words to "every German" or to "every citizen," it does not by any means follow that aliens are excluded from its enjoyment. For instance, Article 118 guarantees to "every German," *inter alia*, the right to freedom of speech. Now the liberty of the press is conceded by federal statute to foreigners in exactly the same way as to German subjects. If aliens, then, are free to express their opinions in print, the conclusion seems unavoidable that, *a fortiori*, they are entitled to do so by word of mouth. On the other hand, the right of meeting and of association (Art. 124) is not shared by foreigners, a German law limiting its benefit to German nationals. Sometimes again the very nature and content of the right, *e.g.*, to hold public office (Art. 128), makes it obvious that it belongs in fact, as well as in terms, to members of the

federation only. Subject to this exception, it is submitted, the fundamental rights are conferred by the constitution on Germans and aliens alike; but in the case of foreigners they may, whilst in the case of Germans they may not, be abridged by ordinary federal law.

The second principal part is divided into five sections, entitled respectively "The Individual," "Social Life," "Religion and Religious Bodies," "Education and Schools," and "Economic Life." This classification is not by any means a scientific one. Rights cannot belong to the individual except in his social relations, and religion, education, and activities in the economic sphere cannot be opposed to, but are so many aspects of, social life. Still, as mere labels for groups of rights the headings chosen answer as well as any others. For the purposes of this book, however, it will be more convenient to arrange the subject-matter in the following two main divisions:

(1) Fundamental rights of the traditional kind, i.e. such as form part of the stock of most constitutions since the end of the eighteenth century. Most of these rights are collected together under the heading "The Individual," but others are found scattered through the later sections. It will be sufficient to pass them in review and to take note of such modifications as they have undergone in the German constitution.

(2) Fundamental rights of a novel kind, found for the first time in the Weimar constitution. Many of these are elaborated with a wealth of detail of no interest to the foreign reader. The leading principles only will be expounded.

A. Traditional Fundamental Rights

A first series of rights flows from the principle of *Equality*, which is worked out in all its ramifications. Section I. opens with the statement that "all Germans are equal before the law." (Art. 109.) All Germans have equal political rights

and duties (*ibid.*) and are equally eligible for all public offices, provided they have the necessary qualifications and capacities (Art. 128); and they have equal rights not only in the federation, but exactly the same rights in each state as the subjects of that state themselves (Art. 110). Neither creed (Art. 136) nor "in principle" sex (Art. 109) makes a difference. The qualifying words have been variously interpreted by different commentators, some holding that they are meant merely to exempt women from duties for which they are constitutionally unfit, *e.g.*, service under arms to aid in the suppression of riot and rebellion, the duty to help the police in emergencies, whilst others maintain that they are intended to keep in force legislative provisions differentiating between the sexes and to enable the future legislator to discriminate when it seems good to him. It is certain that a good many public appointments, judgeships for instance, are still closed to women. All forms of discrimination against women officials are to be abolished, (Art. 128.) This clause refers, not to appointment to office, but to women actually holding office. Under it a Bavarian ordinance according to which female teachers on marriage lost their appointment and their right to a pension, was declared unconstitutional by the supreme federal court. "All advantages and disadvantages of birth and rank within the sphere of public law are to be abolished." (Art. 109.) This clause is directed, on the one hand, against the privileged position of the former ruling houses and of the high nobility, the mediatised families, and in this sense it has been carried into effect by appropriate legislation in the states; on the other hand, it makes it compulsory for the state legislatures to remove public disabilities of illegitimate children, where still existing. The constitution goes further in its care for these innocent sufferers and lays down that laws must be enacted to ensure that they are offered the same opportunities for their physical, mental and social development as legitimate children. (Art. 121.) Indeed, not only legal and political, but social equality too has been the aim of Weimar. Hence also the following

provisions: "Titles of nobility are considered to form part of the name only" (Art. 109), with the result that the noble family name of the unmarried aristocratic mother henceforth descends to her fatherless child. Titles of nobility "may no longer be conferred. Titles may be conferred only when descriptive of an office or calling; academic degrees are not, however, affected by this provision. Orders and decorations may no longer be conferred by the state. No German may accept a title or an order from a foreign government." (Art. 109.) Just as to legitimate and illegitimate children, so to the children of the rich and poor equality of opportunity is to be guaranteed. "Public elementary schools common to all are to serve as the foundation of secondary and higher education. . . For the admission of a child to a certain type of school its own gifts and inclinations, and not the economic and social position . . . of its parents, are decisive." (Art. 146.) No private school may be licensed if a separation of pupils according to the financial position of their parents is thereby furthered. (Art. 147.) "Private preparatory schools"—which served exclusively the privileged classes—"are to be abolished." (*Ibid.*) Only one pariah caste is known to the constitution, viz. soldiers, as to whom it is provided (Art. 133) that a federal statute is to define the extent to which they are to be excluded from the benefit of some of the fundamental rights for the sake of military discipline. It is laid down accordingly in paragraphs 36 and 37 of the Federal Defence Law of 23rd March, 1921, that they may not take an active part in politics, may not join political associations nor attend political meetings. Their right to vote at federal, state, and communal elections is suspended during their term of service. They may be forbidden to become members of certain non-political societies or to read newspapers the contents of which tend to the subversion of military discipline, public order, or of the stability of the constitution.

Even more fertile the principle of *Liberty* has proved, its offspring, rights to freedom and inviolability, occupying a large

part of this chapter. "Personal freedom is inviolable. No restraint or deprivation of personal liberty by the public power is permissible, unless it is authorised by law. Persons in custody are to be informed, at the latest on the following day, by what authority and upon what grounds they were ordered to be deprived of their liberty, and they must at once be given the opportunity to raise objections against such deprivation." (Art. 114.) All these provisions are directions to the executive only, and if the latter chooses to disregard them it is cold comfort to the victim to learn at whose instance and wherefore he has been arrested and to be allowed to protest against his arrest, if no remedy, such as the English writ of *habeas corpus*, is placed at his disposal by which to enforce his speedy trial or prompt deliverance. A similar defect attaches to the following article which extends the inviolability of a man's person to his home. Every German is free to move from place to place, to stay, to settle, to acquire land, and to follow his calling, in any part of the federal territory he likes (Art. 111); and if he wishes to shake off the dust of the fatherland from his feet he is entitled to emigrate to foreign countries. (Art. 112.) Only federal law may restrain his freedom of movement in any of these directions. And it does so very effectively. For an ordinance of 23rd July, 1919, empowers the local authorities to exclude strangers from any locality in which there is a shortage of houses, and this shortage is an evil common to all parts of Germany. Again, it is provided by federal statutes of 26th July, 1918, and 24th June, 1919, that any German who intends to settle abroad must give notice to the inland-revenue authorities, at the same time making a return of all he is worth, must engage to continue to pay both federal and state taxes on a specially high scale, and give security, up to fifty per cent. of his capital, for the payment of such taxes. These enactments practically amount to a prohibition on the well-to-do; the prevailing rates of exchange do the same for the poorer classes. So German emigration would be on a very limited scale even if more foreign countries were to welcome Germans

to their shores. But whilst, in theory at least, there is no obstacle to emigration, no German may be surrendered to a foreign jurisdiction for trial and punishment. (Art. 112.) This rule is not peculiar to Germany, though it differs from that of English and American practice. For it is a principle acted upon, though not generally guaranteed by the constitution, in almost all continental countries, that a state does not extradite, but itself punishes, its own subjects for crimes committed abroad. A provision which shows the policy of the young republic in favourable contrast with the practice of imperial Germany is that of Article 113, according to which no obstacles may be placed, either by the legislature or the executive, in the path of social and cultural development of racial minorities; in particular, they must be allowed the use of their native tongue in education, in intercourse with the public authorities in all the departments of internal administration, and in judicial proceedings. Since the treaty of Versailles the Poles are the only race left to benefit by these provisions. The right to freedom of discussion is proclaimed in the customary terms. "Every German is entitled within the limits of the general law freely to express his opinions by word of mouth, writing, printing, pictorial representation, or otherwise." (Art. 118.) But the German constitution goes farther, and the provision that "no condition of work or employment may curtail that right, and no one may put him to a disadvantage for having made use of this right," is one of those instances in which a fundamental right is guaranteed as against a social power other than the state, here the employers as a class. But it avails against the state too; for the wording clearly covers employment in the public services. In the latter respect the clause acquires a special significance if read in conjunction with that of Article 130 by which freedom of political opinion is guaranteed to all officials. It may be asked what this provision profits the servant since the employer is in any case free to get rid of him. He is not under modern German law. The clause of

the constitution imposes on every judge the duty to pronounce invalid a notice to quit based on such grounds. But how if the employer determines the contract of service without assigning any reason at all? Even against this contingency the servant is protected. For no one who employs more than a handful of people can nowadays lawfully dismiss a single workman or clerk without first consulting, and obtaining the consent of, the works' council. There is no censorship, but as regards the following matters it may be imposed by law:—

(1) cinematographic performances. In the exercise of the power conferred on the federation in Article 7 the statute of 12th May, 1920, has been enacted, which renders censorship compulsory for all films except those used exclusively for scientific or artistic purposes in educational and research institutes;

(2) to combat literary publications of a base or pornographic character;

(3) public shows and representations, in so far as necessary for the protection of the young. (Art. 118.)

Whilst, subject to these exceptions, there is complete freedom of publication, the constitution also guarantees the secrecy of certain communications. Article 117 runs: "The secrecy of correspondence, as well as the secrecy of postal, telegraphic and telephonic communications is inviolable. Exceptions may be admitted by federal law only." By the words "secrecy of correspondence" protection is given against unauthorised interference by private persons, by the following phrases against public authorities. From the concluding sentence of the article a curious result follows: since in Germany the police derives all its powers from state laws, it cannot in any circumstances intrude upon the privacy of the communications here mentioned.

Unlike in most continental countries, the right of public meeting is subject to almost no restrictions. Even as regards open air meetings the only special regulations are

(1) that they may, by federal law, be made notifiable to the police;

(2) that they may be forbidden, if constituting an immediate danger to public security. (Art. 123.)

By an amendment of the constitution, embodied in the federal law of 8th May, 1920, open air meetings and public processions are forbidden within a mile of the Reichstag building. Again, freedom of association is guaranteed for any purpose "that does not run counter to the criminal law. This right may not be curtailed by preventive measures." (Art. 124.) The principle being laid down in sweeping terms, it would hardly seem necessary to mention classes of associations which are not to form exceptions to its application. Yet Article 124 itself specifies religious societies, presumably to draw attention to the fact that all state laws imposing restrictions upon Roman Catholic orders and similar bodies are henceforth unconstitutional and repealed by the clause; for the latter is one of those, not addressed to the future legislator, but intended to be immediately operative. The right to freedom of association also applies to societies formed for the practice of a common religion, *i.e.*, to churches, which are further guaranteed freedom in the management of their own affairs. (Art. 137.) One type of associations is, however, unlawful though their object does not run counter to the criminal law. The constitution does not mention them. But according to Article 177 of the treaty of Versailles no society may exist in Germany that engages in military affairs, and not only are the provisions of that treaty "not affected by the constitution" (Art. 178 of the federal constitution), but it is laid down in a federal statute of 31st August, 1919, that associations formed in contravention of that prohibition of the peace treaty are liable to be dissolved. Every society can claim to be incorporated according to the provisions of the civil code. Incorporation is effected by registration, and registration may no longer be refused on the ground that an association has a political or religious object.

(Art. 124.) Churches have the further privilege that they can aspire, subject to certain conditions, to recognition as public corporations. (Art. 137.) Closely akin to, though not identical with, the right of association is a fundamental right extremely modern in character, viz. the right to freedom of combination, which is accorded to all, whatever their occupation. (Arts. 159 & 130.) It is here mentioned on account of that affinity, but its discussion will be reserved for a later part of this chapter.

To return to the common constitutional stock, freedom of conscience is conceded to the fullest extent, and the necessary theoretical conclusions are drawn from it. This does not, however, mean that in practice religious toleration has made any progress in Germany since the republic has been established. "All inhabitants of the federation enjoy full liberty of faith and conscience. The undisturbed practice of religion is guaranteed by the constitution and is under the protection of the state." (Art. 135.) But religious freedom is limited by, and does not limit, the law of the land and the duties imposed by it. (*Ibid.*) Just as all citizens have the same civil and political rights, whatever their faith, so nobody may claim exemption from his obligations to the state on religious grounds. (Art. 136.) Whilst a man is free to profess his religion, he is not, on the other hand, bound to disclose it. The public authorities may not inquire to what church a man belongs, or whether he belongs to any, unless rights or duties, *e.g.*, liability to pay church taxes, depend upon such membership, or unless the information is required by law for statistical purposes. (*Ibid.*) The right to freedom of worship has its counterpart in the provision that "no one may be compelled to perform a religious act or ceremony or to take part in religious practices" (Art. 136), and soldiers and inmates of public institutions are specially assured from any such constraint (Art. 141). But they must be afforded opportunities to perform their religious duties. Members of the defence force are to be given the necessary leave (Art. 140), and "in

so far as there is a demand for worship and care of souls in the army, in hospitals, penal establishments, or other public institutions, clergymen of the respective denominations are to be admitted to perform religious acts." (Art. 141.) Again, "it lies entirely in the discretion of teachers whether or not to give religious instruction and to perform religious ceremonies, whilst those responsible for its education are free to decide whether a child is to attend classes of religious instruction and to take part in religious ceremonies and acts." (Art. 149.) Nobody may be compelled to take an oath in religious forms. (Art. 136.) This provision means an improvement on the previous state of the law. But the formula "I swear," is still obligatory (Art. 177); a simple declaration or affirmation will not do. Art, science, and the teaching of either are free from all official control; moreover, the state undertakes to protect them from interference by other social powers. (Art. 142.) Freedom of trade and industry (Art. 151) and freedom of contract (Art. 152) are guaranteed "within the limits of the law." In the economic sphere "legal compulsion is admissible only in so far as it is necessary for the realisation of threatened rights or to serve overriding claims of the common weal." (Art. 151.) What constraint could not be justified for the sake of these ends? Their vagueness makes "the limits of the law" very elastic indeed. That nothing may be wanting, liberty of voting is once more assured as a fundamental right. (Art. 125.)

"Every German has the right to complain in writing or to present petitions to the competent authority or to the representatives of the people. This right may be exercised either by individuals severally or by a number of persons jointly." (Art. 126.) According to German commentators the sequence of words in the text is intended to make it compulsory for an aggrieved party to seek redress, in the first instance, from the competent authorities and to allow him to address himself to parliament only if he fails to get satisfaction. Subject to this condition, the Reichstag acknowledges that it is under a duty,

corresponding to this right of the citizen, to receive and deal with petitions: it is prescribed by paragraph 28 of its Standing Orders that "some response is to be made in every case." A special committee on petitions has been formed (St.O., par. 26), which makes abstracts of all petitions received and circulates their substance in tabular form among all the members of the Reichstag. Petitions are discussed by the House on the motion of the committee or of fifteen members. (St.O., par. 28.) Soldiers alone are excluded from the exercise of this fundamental right, as it is held to be a form of political activity.

B. New Fundamental Rights.

In some instances ordinary rules of constitutional law and practice have been inserted amongst, and thus raised to the rank of, fundamental rights for no apparent reason other than that, perhaps, a convenient place could not be found for them elsewhere. Yet even this feeble excuse would not justify such a "fundamental right" as that defined in Article 110: "Nationality in the federation and in the states is acquired and lost in accordance with the provisions of a federal law. Every subject of a state is at the same time a subject of the federation." Nationality is mentioned in Article 6 as one of the subjects on which the federation alone has power to legislate; and the text just quoted seems to do no more than to reassert that right, at the same time offering, in the last sentence, an explanation why the acquisition and loss of citizenship in the states are matters of national concern. The enunciation of the principle that "all subjects of the federation both within and outside federal territory have a claim to the protection of the federation against foreign states" (Art. 112), seems, at first sight, as innocent as unnecessary. But the sting is in the words "within federal territory." Large parts of the latter being in foreign occupation, the federation promises their inhabitants such protection as it can afford them. What this promise and this protection amount to, is vividly illustrated in the Ruhr. Local self-government "within the limits of the

laws" is formally placed under constitutional guarantee (Art. 127); but since by "laws" here both state laws and federal laws are meant, local communities have just so much of it as the states choose to concede them. To a limited extent the constitution itself interferes with their independence, as by defining the qualifications of voters at communal elections (Art. 17), by conferring on the federation power to lay down principles governing the status of their officials (Art. 10). On the other hand, it assigns to them a share in certain branches of administration, *e.g.*, in public education (Art. 143), in the management of economic enterprises (Art. 156), and it imposes upon all citizens the duty to render personal services to the local communes, no less than to the state (Art. 133). The constitution imposes an obligation upon the federation, the states, and public corporations to hold themselves responsible in damages for the tortious acts of their respective officials done in their official capacity, without prejudice, however, to their claim to be indemnified by the guilty official. The regular courts have jurisdictions over these causes. (Art. 131.) The provision is held to preclude the injured party from proceeding against the official himself.

A goodly number of fundamental rights of the new order consists of principles laid down in the immediate exercise of legislative powers that have been conferred on the federation in the early articles of the constitution, in some cases the powers themselves being extended. Examples are to be found in the group now to be discussed, which may be termed rights to protection. The constitution spreads its protecting wings far and wide over institutions and social groups. The mass of rhetoric in which the men of Weimar avow their platonic love for the institution of marriage (Art. 119), has already been quoted. Again, fair phrases, at the very best mixed with vague promises of future protective legislation, is all that the following clause has to offer: "The preservation of the purity and health, and the social furtherance, of the family is the task both of the state and of the local communities"—till

terra firma is at last reached in its concluding sentence, "Large families have a claim to compensatory advantages." The constitution does not disclose, and presumably has not made up its own mind, wherein these advantages are to consist; but a deduction in respect of children in the assessment of taxes is sure to be one of them. Marriage and the preservation of the purity of the family, as special objects of the fostering care of the constitution, are alike forgotten when it is acknowledged that motherhood as such—whether in wedlock or out of wedlock —has a claim upon the protection of the state. (Art. 119.) The statement that "the education of the offspring so as to ensure their physical, mental and social fitness, is the supreme duty and at the same time the natural right of the parents" (Art. 120), derives its legal content from the proviso that "the state has to watch over their activities in this direction" (*ibid.*), but is at the same time a standing protest against the socialistic doctrine according to which it is the task of the state to undertake, and not merely to supervise, the bringing-up of children. The article just quoted deals with infancy and childhood. Public control is not, however, relaxed when adolescence is reached. The constitution provides (Art. 122) for the protection of the young against exploitation, whether by their parents or by strangers, as well as against moral, intellectual, or physical neglect. "The state and the local communities have to make the necessary arrangements." Here, as in some other instances, the federation, whilst reserving to itself the power of regulating measures of social welfare, hitherto taken of their own accord in an exemplary fashion by local authorities, still assigns to the latter a share in carrying them out. The clause with which the article concludes, viz. that "compulsory protective measures may be imposed only in so far as authorised by law," contains an assurance entirely superfluous, since the proposition, without the qualifying word "protective," is a principle of law of universal application. That to prevent corruption of the young censorship of public shows and representations is permissible (Art. 118) has already been mentioned.

Art, science, and the teaching of either have guaranteed to them, not only, as explained in the earlier part of this chapter, freedom from extrinsic interference, whether by state or other social powers, but active furtherance by the former. (Art. 142.) The recognition and liberal fulfilment of this duty both by the federation and by the states had been one of the glories of the older *régime*. The national assembly has done well to subscribe to the article of faith that in a modern state these higher interests are not luxuries that can be dispensed with at will, but matters of vital necessity to the nation. Owing to the emptiness of the exchequer, however, the means of their satisfaction, like many necessaries in the material sphere, have now to be so strictly rationed in Germany that the line of semi-starvation has long been passed. Not only art and science themselves, but their fruits and the rights of their devotees are likewise safeguarded: "Intellectual work, the rights of authors, inventors and artists enjoy the protection and care of the federation. For the creations of German science, art and technique recognition and protection must be secured in foreign countries by means of international treaties" (Art. 158), and again, "Artistic, historical, and natural monuments, as well as landscapes, enjoy the protection and care of the state. It is the task of the federation to prevent the exportation to foreign countries of German art treasures." (Art. 150.)

One class that, in spite of its generally privileged position, had a good many grievances of its own in pre-revolutionary days, viz. the officials of the federation, the states, and other public corporations, is assured by the constitution of protection and sympathetic treatment. Those Ishmaels among public servants, the teachers in public schools, are henceforward to have all the rights and duties of government officials. (Art. 143.) Power has been conferred on the federation in Article 10 to lay down general principles for the regulation of the status of all public officials, and this power is converted into a duty by the provision of Article 128 that "the principles governing the status of officials are to be laid down by a federal law." Not

content with this promise, the constitution at once begins the task and in more than one instance goes beyond it, by descending from general principles to somewhat detailed rules. Officials are warned that they must no longer regard themselves as the masters, but be satisfied with playing the minor part of servants, of the community (Art. 130); the added words "not of a party" are not intended as a veiled reproach about their past conduct, but rather as an assertion that the spoils system will not be tolerated in Germany, its ghost constantly haunting the Weimar assembly, as being in their imagination the almost inseparable companion of the plebiscitary president. Subject to this condition, almost all their demands have been granted —formally at any rate. They are appointed for life "unless otherwise provided by law." (Art. 129.) They may not be suspended from office, compulsorily retired, or transferred to another office carrying lower pay, except "under the conditions and in the forms provided by law." (*Ibid.*) But since the term law in either case embraces state laws no less than federal law, the security of tenure of office remains somewhat illusory. "Pensions and provision for surviving dependents are regulated by law." (*Ibid.*) "The well-established rights of officials," by which, according to Anschütz, are meant their rights to their official character, rank and title, to their pay, to a pension, and to provision being made for them in case of accident, "are inviolable," *i.e.*, they can be curtailed by an amendment of the constitution only. They must be allowed to pursue claims of a financial character, arising out of their office, by ordinary legal process. In both the latter respects professional soldiers are equally privileged. (Art. 129.) Officials must be given the opportunity to appeal against "every disciplinary award of a penal character," with a view to a reopening of the proceedings. "No fact prejudicial to an official may be entered in his personal record unless he has been given an opportunity to offer explanations. Every official is to be permitted to inspect his personal record." (*Ibid.*) Whilst the protection against unfair secret records is complete, the right to offer explanations, it will

be noted, applies only to the entry of facts, not of opinions, prejudicial to the official. A concession of an entirely novel character is the guarantee to all officials of "freedom of political opinions and freedom of combination." (Art. 130.) The former right is presumably meant to include the right to the free expression of political opinions, though this is disputed. But even if it does not, the clause is a decisive step in the emancipation of officials from government tutelage in matters political. For in imperial Germany an official who voted for the opposition or who was suspected of merely entertaining political views displeasing to the government, *e.g.*, of democratic leanings, was a marked man. The federation is given power, in Article 7, to provide for the formation of occupational chambers, and the federal legislature is now directed (Art. 130) to regulate in detail the organisation of chambers of civil servants.

"Labour is under the special protection of the federation." (Art. 157.) As foreshadowed in Article 7, "the federation will draw up a uniform labour code." (Art. 157.) The subject is to be approached in an entirely new spirit. "Hitherto," the reporter of the committee on the constitution explained, "it has always been treated as a sort of appendix to the law of property and based mainly, though not entirely, on the conception of *locatio conductio operarum* in Roman law. Moreover, provisions relating to this important subject are found scattered in a vast number of statutes." It is now to be codified on a uniform plan, the leading principle being that labour is not primarily a subject of contract between the employer and the workman, but a matter of public concern to be inspired by considerations of public policy. Germany, having done a good deal of pioneer work in labour legislation, finds it incumbent upon her, not only to complete that task, but also to embark upon a foreign mission and "advocate such an international regulation of the status of workmen as tends to secure to the labouring classes everywhere a general minimum of social rights." (Art. 162.) A plan for such international regulation

is indeed mapped out in Part XIII. of the treaty of Versailles; but German sources of inspiration are still treated as tainted in the council of nations. Meanwhile at home, corresponding to the moral obligation to work, a right to work is recognised (Art. 163)—not for the first time in a constitution; the French constitution of 4th November, 1848, has supplied the model for this provision. But the phraseology of the German clause, "Every German shall be given a chance to earn his living by economic labour," makes it clear that it does not found a legal claim. It is otherwise with the right to maintenance during periods of unemployment: "In so far as no suitable work can be found for him, provision is made for his support. All details will be regulated by special federal laws." (Art. 163.) The workman is assured of his weekly day of rest. (Art. 139.) "Any one in the position of an employee or workman has the right to such leave of absence from work as is necessary to enable him to exercise his political rights and, in so far as the business in which he is employed is not seriously prejudiced thereby, to fill honorary public offices. . . . The law will provide to what extent he continues entitled to his pay in these circumstances." (Art. 160.) The constitution comes a little late in the day with its promise to "establish a comprehensive scheme of insurance for the maintenance of health and fitness for work, for the protection of motherhood, and as a provision against the economic consequences of old age, infirmity, and the vicissitudes of life." (Art. 161.) The gentlemen of Weimar must have been asleep these last fifty years to have so entirely ignored the work inspired by Bismarck as early as 1881 and systematically carried out, developed and added to ever since. Life insurance for the benefit of widows and orphans having been made compulsory in 1911 and maternity insurance having been introduced by a federal statute of 20th September, 1919, nothing fresh remains to be done except to provide for such "vicissitudes of life" as human ingenuity may find not to be covered by the existing schemes. But what is new is the provision that in the administration of all branches of social

insurance "a predominant share will be given to the persons insured." (Art. 161.) Except in the case of sickness insurance, administration had hitherto been almost entirely on bureaucratic lines. The organisation of workmen's councils and their participation in the formation of economic councils have been described in an earlier portion of this work. The part which the workmen and other employees are to play in the future management of industrial enterprises will be considered in a later part of this chapter.

"Freedom to combine for the protection and betterment of their conditions of labour and their economic position generally is guaranteed," not to workmen alone, as hitherto, but "to all and in all occupations" (Art. 159), *e.g.*, to public officials (Art. 130) and, since it is not a political aetivity, but one directed towards economic ends, it is said, even to soldiers. It is one of those fundamental rights guaranteed both against the state and against other social powers, as for instance employers. "All agreements and measures which tend to restrict or abrogate that freedom are contrary to law" (Art. 159), *i.e.*, such agreements are void, and measures which curtail this right, *e.g.*, black lists, are actionable wrongs. It was definitely stated in the national assembly that freedom to combine does not imply a constitutional recognition of a right to strike.

While the labouring masses are treated with special tenderness, they do not monopolise the motherly care of the constitution. "The interests of the independent middle class, engaged in agriculture, industry and trade, are to be furthered both in legislation and administration. It must be protected against excessive burdens and against the risk of absorption." (Art. 164.)

In the German empire church and school belonged to the province of the states with which the federation never interfered. The first inroad upon this monopoly is made in Article 10 of the republican constitution, in whieh the national legislature is authorised to prescribe norms for the rights and duties of the churches as well as for public edueation; and in

both these cases, as in not a few others, the principles are actually laid down in the constitution itself under the guise of fundamental rights. The provisions under either of these headings have the word compromise writ large across them; they represent a *via media* found between ecclesiastical and socialistic claims.

The right to freedom and equality in matters of religion accorded to the individual is extended to the churches. "There is no state church." (Art. 137.) The separation of state and church is thus erected into a maxim of the constitution, and it is made obligatory for those territories in which a state church had hitherto existed, to disestablish it forthwith. In losing their privileged position, these churches at the same time escape from that special control by the temporal power to which they had been subject. All religious bodies are henceforward treated alike, and "associations formed for the common cultivation of a world philosophy," such as the monistic alliance, the freethinkers' union, ethical societies, "are placed on exactly the same footing as religious bodies." (Art. 137.) The principle of freedom of association applies to the formation of religious bodies, and no obstacle may be placed in the way of the union of churches within the federation. (*Ibid.*) The latter provision has been inserted for the benefit of the protestant churches which, as state churches, had been territorially organised and now aspire to unification in a national evangelical church. "Every religious body orders and administers its affairs independently within the limits of the law applicable to all. It confers its offices without the co-operation of the state or of the civil community." (*Ibid.*) Commentators differ as to the meaning of "the law applicable to all," which is to prescribe limits to their right of self-determination and self-government. Is it the law applicable to all subjects, i.e. the general law of the land, so that special laws dealing with religious bodies would be unconstitutional? The power conferred on the federation in Article 10 to regulate their rights and duties, and the authority given in this present article to the

state legislatures "to enact such further provisions, if any, as may be necessary to give effect to these principles" appear to contradict this interpretation and to be no less fatal to the view that the law applicable to all associations, whatever their nature and objects, is meant. The words in dispute, then, are presumably intended to lay down the principle of equality in the treatment of all churches, so as to render unconstitutional any enactment by which special privileges are accorded to, or special disabilities imposed upon, some of them only. The opinion most widely held is that the legislator may not interfere with their internal affairs, but is to define their relations to non-members, to public authorities, and to the state in particular. The principle of equality, however, holds good *sub modo* only. The status of religious bodies varies according as to whether they are, or are not, public corporations. All of them, indeed, are entitled to incorporation under the general provisions of the civil code, that is to say by mere registration as societies. The executive has no longer the right to object, and state laws, such as Article 13 of the old Prussian constitution of 1850, according to which religious bodies and associations can be incorporated by a special law only, are inconsistent with the new federal constitution and repealed by it. But "religious bodies that were hitherto public corporations remain such," and their unions have the same status. "On their proposition other religious bodies are to be granted the same privileged position if by their constitution and membership they offer guarantees of permanence." (Art. 137.) Now the status of public corporations varies in detail in different states. But, generally speaking, they enjoy certain privileges and are, on the other hand, subject to a certain amount of state control. A feature common to all of them is the right to tax their members, and the constitution accordingly concedes to religious bodies invested with that character the privilege "to levy taxes on the basis of the state tax-rolls." (Art. 137.) They are thus relieved of the necessity of independently assessing their members. Moreover, upon proper demand being made, the federal minister of

finances may transfer to the federal revenue authorities the administration of church taxes (law of 13th December, 1919, on the regulation of federal taxes, par. 19, sec. 2), which are to be levied by adding a percentage to specified federal taxes (law on state taxes of 30th March, 1920, par. 15). By clothing the principal churches with the character of public corporations, the constitution bears testimony to the value of the social and moral forces embodied in them and acknowledges that, after all, a religious body is something very different from a trading company or a sporting club. Altogether the separation of state and church does not mean, in Germany, a violent rupture between the temporal and the spiritual power. The manner in which it is carried through stands in marked contrast with the policy adopted in France in 1905. State contributions could not indeed be continued in the new order of things, but provision is made for compensating those religious bodies which had hitherto received them, according to a scheme of commutation to be laid down in a federal statute. (Art. 138.) The claim of the churches was all the more readily recognised as just since historically their title to these annual payments arose largely from the secularisation of church property in the past. Moreover, constitutional guarantees are offered against present and future secularisation: "Rights of ownership and other rights of religious bodies and their unions in their ecclesiastical, educational, and charitable institutions, foundations, and property in general are guaranteed." (*Ibid.*) The constitution contains ample proof that its church policy was inspired by no anti-religious bias. Thus "Sundays and public holidays continue to enjoy the protection of the law," not only "as days of rest from labour," but also "as days of spiritual edification." (Art. 139.) Again, religious instruction remains a regular subject in public schools (Art. 149); and "the theological faculties at the universities are maintained" (*ibid.*), which in Germany means, maintained at the expense of the state.

While, then, in matters of religion the severance by the state of its connection with the church and the recognition of a

diversity of creeds, all equal in the eyes of the law, are the leading principles of the constitution, just the opposite results, viz. nationalisation and uniformity, are aimed at in its educational policy. It is for the sake of a uniform national education that the federation, for the first time, takes a hand in it, and for the same reason each child is to receive its education, in principle, at a public school, which in Germany means a state or communal school. "The education of the young is to be provided for by means of public institutions. In their organisation the federation, the states, and the local communities co-operate." (Art. 143.) To prevent that uniformity being destroyed by private schools, which are still tolerated to a limited extent in certain circumstances, these no less than public schools are subject to state supervision: "The whole of the educational system," *i.e.*, elementary, secondary, and higher schools, "is under the supervision of the state; the latter can assign a share in that task to the local communities." (Art. 144.) Further to ensure that uniformity, "the training of teachers is to be regulated on uniform lines for the whole of the federation" and is to be of a university standard. (Art. 143.) To make the career more attractive, teachers in public schools are given the status of government officials. (*Ibid.*) School inspectors too must have received a proper professional training and are to be whole-time officers (Art. 144); hitherto this function had been performed to a large extent by clergymen in their spare hours. "School attendance is compulsory." (Art. 145.) In the days before Weimar it had been the duty of parents to provide their children with an education not inferior to that prescribed for public elementary schools; that they must actually send them to school, is an innovation. And not only to school; in principle every child is to attend a public elementary school for eight years and thereafter a continuation school up to the completion of the eighteenth year. (*Ibid.*) Whilst in the former all children are taught the same subjects, the latter are specialised, and pupils are offered a

choice, according to their future calling, between industrial, commercial, and agricultural continuation schools. In both the elementary and the continuation schools instruction is given gratuitously, and books, stationery, and other accessories are supplied free of charge. (*Ibid.*) Normally public elementary schools are undenominational; but upon the demand of parents or guardians in a given locality sectarian schools, *i.e.*, schools of a particular religious denomination or world philosophy, or purely secular schools are to be opened, unless the carrying out of a proper educational scheme would be prejudiced thereby (Art. 146); that is to say, the request is to be complied with only if there is a sufficient number of pupils and the necessary funds are available. "The system of public education is to be developed as an organic whole." The need to provide suitable preparation for a variety of occupations is to be the determining factor in the organisation of different kinds of schools. "A first school common to all is to serve as the foundation of secondary and higher education." (Art. 146.) By the federal law on first schools of 28th April, 1920, par. 1, it is enacted that the four lowest forms of public elementary schools are to be the "first school common to all." In other words, every child attends a public elementary school for four years, after which time it will be decided whether it is to remain there or is to proceed to a secondary or higher school. For the admission of a child to either of the latter its own gifts and inclinations are decisive, and not the financial and social position of the parents nor their religion. In order to enable the children of the poor to attend secondary and higher schools, where, unlike in public elementary and continuation schools, instruction has to be paid for, educational grants are to be made to the parents out of public funds till the children have completed their education. (Art. 146.) "Private schools which are to serve as substitutes for public schools require a state licence"; such licence is to be granted only if the following conditions are fulfilled, viz.:

(1) they must not be inferior to public schools either in their

educational aims and organisation or in the scientific training of their teaching staffs;

(2) a separation of pupils according to the financial position of their parents must not thereby be favoured;

(3) the legal rights and economic position of the teaching staff must be sufficiently secured. (Art. 147.)

Far more stringent are the conditions under which alone private elementary schools may be licensed. A licence may be granted only in two cases, either if in a given locality there is no public elementary school agreeable to the religious or philosophical convictions of a minority of parents and guardians; or if the educational authorities find that such school serves a special paedagogic interest, as schools for the blind, the deaf and dumb, the feeble-minded. (*Ibid.*) Private preparatory schools, a luxury which only the well-to-do could afford, are to be abolished altogether. (Art. 147.) "In every school the educational aims must be moral training, public spirit, personal and vocational efficiency, and, above all, the cultivation of the German national character and of the spirit of international reconciliation." In public schools, moreover, toleration must be the watchword; special care is to be taken in teaching not to wound the susceptibilities of those holding different opinions. Politics and civics and technical education are subjects of instruction. (Art. 148.) "Religious instruction is a regular subject in schools other than those purely secular." (Art. 149.) It is compulsory for the schools to provide it, but not for any teacher to give, nor for any child to receive it. "Religious instruction is given in accordance with the respective doctrines of the various denominations." (*Ibid.*) In non-sectarian schools each child receives instruction in the special creed or system of world philosophy professed by its parents, and since children of various denominations are thus educated simultaneously, these schools are known as simultaneous schools. "Popular education, including university extension teaching, is to be furthered by the federation, the states, and the local communities." (Art. 148.)

The fundamental rights in the economic sphere are intrinsic evidence of the fact that the constitution is the fruit of a revolution socialistic as much as democratic in character. The provisions by which the working classes are guaranteed protection, as outlined above, already show a tinge of red. This colouring becomes louder as the articles are reached in which the principles of the future economic organisation are laid down. But however strong the influence of socialistic theory has been, its doctrines could gain admission only at the price of strong dilution and of substantial concessions to the traditional capitalistic order. It is true, occasionally these concessions give the impression as if they existed on paper only, and the compromise reached may, to a certain extent, merely conceal, instead of avoiding, political conflicts; yet, on the whole, an honest attempt has been made to reconcile two antagonistic systems and to harmonise the claims of capital and labour. The Frankfort constitution of 1849, which has served as the chief model for the formulation of fundamental rights to the Weimar text, had laid down, in Article X., a number of maxims intended to realise, in the economic sphere, the liberal tendencies then everywhere current. The article with which the fifth section of the second principal part of the new constitution opens, makes it at once clear that the economic policy of *laisser faire* belongs to the past. "The organisation of economic life must accord with the principles of justice and aim at securing for all conditions of existence worthy of human beings. Within these limits the individual is to be secured in the enjoyment of economic freedom." (Art. 151.) Social justice and the common good, then, are to be the foundations of the new economic order. Economic freedom is no longer an end in itself, but it is recognised as desirable in so far as it is compatible with the demands of general welfare. Hence the new system does not mean a return to the ideals of paternal government nor does it erect public control into an idol. "Legal compulsion is admissible only so far as necessary for the realisation of threatened rights or to serve the overriding claims of the common weal." (*Ibid.*)

And if "freedom of trade and industry is guaranteed within the limits of the federal laws," the constitution, at any rate, prevents its curtailment by state legislation. The three pillars of capitalism, freedom of contract (Art. 152), private property (Art. 153), and rights of succession to the estate of a deceased person (Art. 154) are all found in the constitution. But they are merely recognised, not guaranteed, by it. Each of them is limited by "the laws," present and future; *i.e.*, they are at the disposal of the ordinary legislature, and no amendment of the constitution is required to reduce, or even completely to exhaust, their content. In each instance too the constitution itself sets limits to these rights. Thus the avoidance of transactions which offend *contra bonos mores,* and the illegality of usury, long recognised in the civil code, are converted into constitutional principles. Again, in assigning to the state a share, to be fixed by law, in the estate of a deceased person, the constitution not only authorises the imposition of death duties, but is thought to contemplate the exclusion of distant relatives, in cases of intestacy, in favour of the state. Far more radical are the inroads which it plans on proprietary rights themselves. An appeal is made to the conscience of the wealthy to look upon their property as in the nature of a trust and to put it to such uses only as promote at the same time the public good. (Art. 153.) Landlords are specially reminded that the cultivation and utilisation of the soil is a duty which they owe to the community. (Art. 155.) But the constitution does not leave it at that. It divests property of its absolute sacrosanctity. Expropriation, it is true, is permissible only in the public interest and is subject, in principle, to adequate compensation. But not necessarily so; for expropriation without compensation may be decreed by federal law, except in the case of property belonging to a state, a local community, or an association which serves public interests (Art. 153), such as charitable institutions, public foundations, co-operative societies, and, above all, the churches. "Land may be expropriated if required for housing, for settlements, for bringing it under cultivation, or for the

encouragement of agriculture." (Art. 155.) With this clause the reader enters the first of the two fields in which the socialistic programme has been carried farthest, viz. land reform. "The distribution and the use of land are under state supervision, with a view to the prevention of abuses and in order to secure for every German a healthy dwelling and for all German families, especially large ones, according to their needs, suitable homesteads and small holdings." (*Ibid.*) A number of enactments testifies both to the zeal of the legislator in carrying out this policy and to the crying need for it. A great hindrance to a good system of distribution and to the effective utilisation of the land are strict settlements, particularly in Germany, where, owing to the want of a rule against perpetuities, lands so settled pass into mortmain. A considerable proportion of the soil is so tied up, in Prussia alone, it is claimed, something like seven per cent., amounting in all to more than six million acres. To remedy the evils resulting therefrom the constitution prescribes that "entails are to be broken off." (Art. 155.) "The unearned increment is to be used for the benefit of the community." (*Ibid.*) The most obvious way of effecting this is, of course, by means of taxation; but commentators suggest alternative measures, such as the compulsory expropriation, without compensation, of part of the land and its use for public highways, squares, or parks, or the reservation of a right of pre-emption to the state or local community. Not only the surface, but also "all subsoil resources and all natural sources of power, so far as they are capable of being put to economic uses, are under the supervision of the state." (Art. 155.) And, finally, the mining royalties subsisting in the hands of the former ruling houses are to be transferred to the state (*ibid.*), the last survival of feudal privileges disappearing with them. The socialisation of economic undertakings claimed the attention of the national assembly very soon after it first met, and a provisional solution was found in a statute of 23rd March, 1919. The constitution, in Article 7, confers on the federation concurrent power to legislate upon "the socialisation of

natural resources and economic undertakings, and the production, manufacture, distribution, and the regulation of prices, of economic commodities under social management." So much importance was attached to the subject that it is the only one as to which the right to veto state laws was reserved to the central government. (Art. 12.) The principles laid down in the statute are further elaborated in Article 156, known in Germany as the article on socialisation, *par excellence*. No definition of the term is given, but it follows from the text that it covers much more than nationalisation. It embraces every form of public control of economic enterprises established with a view to the subordination of private gain to the common good and, in particular, with the aim to increase the efficiency of industry in the public interest and to safeguard both workmen and consumers from unconscionable exploitation by powerful monopolies and trusts. Three types of socialisation are contemplated—

(1) Transfer of suitable private undertakings into public ownership, *i.e.*, into the ownership of the federation, the states, or the local communities, with due observance of the constitutional principles as to expropriation and compensation.

(2) Participation of the federation, the states, or the local communities in their management, and other means of securing to the federation a decisive influence therein, *e.g.*, a power of veto exercisable by the national government in order to prevent measures of an anti-social or economically wasteful character or otherwise contrary to the public interest, such as a rise of prices, a wholesale dismissal of workmen, or closing down of works, without sufficient cause or justification.

(3) Compulsory formation of syndicates with a view to the management on social lines of the undertakings combined, the latter remaining in private ownership. The constitution here proposes to make an experiment of an entirely novel kind, viz. the creation of self-governing bodies in the economic sphere, analogous to the self-governing corporations in public administration. The ideological connection of this plan with the

system of economic councils, as developed in the constitution, is unmistakable. The latter is likewise inspired by the desire to create, by the side of the political organs, independent economic organs for the solution of economic problems by those actually confronted with them in their different aspects. But whilst the councils are territorial, the organisation here contemplated is occupational, "the underlying motive being to secure the co-operation of all productive sections of the community, the participation of both employers and employed in the management, and to regulate, on principles of social economy, the production, manufacture, distribution, uses, and prices, as well as the import and export of economic commodities." The participation of both employers and employed in the management, here spoken of, is one application—the other being seen in the composition of the economic councils—of the principle of Article 165 that "workmen and employees are called upon to co-operate, on an equal footing, with employers in the general development of the productive forces." The following four departments of industry have so far been socialised, coal, potash, electricity, and iron.

If the basic principles were to be defined of which the fundamental rights in the province of industry are an elaboration, they could not better be summed up than in what Mr. Asquith not so long ago described as the three main watchwords of the industrial policy of modern English liberalism, viz.

(1) Partnership in the industrial enterprise.

(2) Security of livelihood for the worker.

(3) Public advantage before private profit.

Have the compromise between socialism and bourgeoisie in Germany and the search for an industrial programme acceptable to the moderately progressive voter in this country led, by independent routes, to the same goal? Or have some of the leaders of liberal thought in England turned over the leaves of the Weimar edition of the political bible and, consciously or unconsciously, reproduced the chief impressions there gained? "Fas est et ab hoste doceri."

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APPENDIX.

THE CONSTITUTION OF THE GERMAN FEDERATION

OF AUGUST 11, 1919.

This Constitution has been framed by the German people, at one in its tribes, and animated by the desire to renew and to establish its Federation on the solid bases of liberty and justice, to serve the cause of peace both within and without, and to promote social progress.

PART I.

STRUCTURE AND TASKS OF THE FEDERATION.

Section I.

The Federation and the States.

ARTICLE 1.

The German Federation is a republic.
Supreme power emanates from the people.

ARTICLE 2.

The federal territory consists of the territories of the German states. Other territories may be incorporated in the Federation by federal law, if their populations desire it in the exercise of the right of self-determination.

ARTICLE 3.

The federal colours are black, red and gold. The flag of the merchant service is black, white and red, with the federal colours in the upper corner next the staff.

ARTICLE 4.

The rules of international law, universally recognised, are deemed to form part of German federal law and, as such, have obligatory force.

ARTICLE 5.

Public power is exercised in federal affairs by federal organs in accordance with the federal constitution, and in state affairs by the organs of the states in accordance with the constitutions of the states.

ARTICLE 6.

The Federation alone has power to legislate upon the following subjects, viz.

(1) Foreign relations.
(2) Colonial affairs.
(3) Nationality, freedom of settlement, immigration, emigration, and extradition.
(4) Organisation of the defence force.
(5) Coinage.
(6) Customs and internal free-trade.
(7) Postal and telegraph services, including the telephone service.

ARTICLE 7.

The Federation has power to legislate upon the following subjects, viz.

(1) Civil law.
(2) Criminal law.
(3) Legal procedure, including the execution of sentences and mutual assistance which the authorities of different states have to render each other.
(4) Passports and police measures as regards foreigners.
(5) Poor-law and provision for travellers.
(6) The press, regulation of the rights of association and of public meeting.
(7) The population question, maternity and infant care, protection of children and young persons.
(8) Public health, the veterinary department, protection of plants against disease and damage from parasites.
(9) Labour laws, insurance and protection of workmen and employees, together with labour bureaux.
(10) The organisation of occupational representative bodies for the federal territory.

(11) Provision for those who took part in the late war and for their surviving dependants.
(12) Expropriation.
(13) The socialisation of natural resources and of economic undertakings, and the production, manufacture, distribution, and the regulation of prices, of economic commodities under social management.
(14) Trade, weights and measures, the issue of paper money, banking and exchanges.
(15) Traffic in foodstuffs and articles of general consumption or satisfying daily wants.
(16) Industry and mining.
(17) Insurance.
(18) High sea navigation, deep sea fishery, and fishing in home waters.
(19) Railways, inland navigation, motor traffic by land, water and air, and the construction of highways, in so far as they serve public traffic and home defence.
(20) Theatres and cinemas.

ARTICLE 8.

Furthermore, the Federation may legislate as regards taxes and other sources of revenue, in so far as they are claimed, either wholly or in part, for federal purposes. When claiming taxes or other sources of revenue which hitherto belonged to the states, the Federation must have due regard to preserve the vitality of the states.

ARTICLE 9.

In so far as there is need for uniform regulation, the Federation may legislate upon all matters concerning
(1) public welfare,
(2) the maintenance of public order and security.

ARTICLE 10.

General principles may be laid down by federal legislation concerning the following subjects, viz.
(1) The rights and duties of religious bodies.
(2) Public education, including the universities and scientific libraries.
(3) The status of officials of all public corporations.

(4) Land laws, the distribution of the land, settlements upon the land and homesteads, the tying-up of land, housing and the distribution of the population.
(5) The disposal of the dead.

ARTICLE 11.

General principles may be laid down by federal legislation concerning the admissibility and method of assessment of state taxes, in so far as they are necessary to prevent

(1) Loss of revenue to the federation or measures prejudicial to its commercial relations,
(2) Double taxation,
(3) Excessive or prohibitive charges for the use of public means of communication or of the institutions connected with them,
(4) Discrimination between different states or parts of states, so that imported commodities are placed at a disadvantage as compared with local products,
(5) Bounties on exportation,

or to protect important social interests.

ARTICLE 12.

So long and in so far as the Federation has not exercised its legislative powers, the states continue free to legislate. This does not, however, hold good of subjects as to which the Federation has sole power to legislate.

The Federation has the right to protest against state laws dealing with any of the subjects of Article 7, No. 13, in so far as the welfare of the community at large is affected thereby.

ARTICLE 13.

Federal law overrides state law.

If there is a doubt or a difference of opinion as to whether a provision of a state law is consistent with federal law, the competent supreme authorities of the federation or of the state may appeal for a decision to a supreme federal court, in accordance with the more detailed provisions of a federal law.

ARTICLE 14.

The federal laws are executed by the authorities of the states, in so far as the federal laws do not otherwise provide.

ARTICLE 15.

The federal government exercises supervision in those matters as to which the Federation has power to legislate.

In so far as the federal laws are executed by the authorities of the states, the federal government may issue general instructions. For the supervision of the execution of federal laws it is empowered to despatch commissioners to the central authorities of the states and, with the consent of the latter, to the subordinate authorities.

The state governments are bound at the request of the federal government to remedy defects discovered in the execution of federal laws. In case of differences of opinion either the federal government or the state government may appeal for a decision to the State Court, unless another tribunal is named in a federal statute.

ARTICLE 16.

The officials entrusted with the direct federal administration in the states shall, as a rule, be members of the state in which they are employed. Officials, employees and workmen in the service of the federal administration shall at their request, as far as possible, be employed near their homes, unless considerations of training or the exigencies of the service stand in the way.

ARTICLE 17.

Every state must have a republican constitution. The representatives of the people must be elected by the universal, equal, direct and secret suffrage of all German subjects, men and women, in accordance with the principle of proportional representation. Each state government requires the confidence of the state parliament.

The principles governing the elections of representatives of the people apply also to communal elections. The right of voting thereat may, however, be made by a state law to depend upon a residential qualification of not more than a year.

ARTICLE 18.

The organisation of the Federation into states shall be such as to promote the highest economic and cultural efficiency of the people, the wishes of the population concerned being taken into consideration as far as possible. Territorial alterations of states and the formation of new states within the Federation are effected

by federal law passed in the form prescribed for amendments of the constitution.

If the states immediately concerned consent a simple federal law is sufficient.

In the absence of such consent a simple federal law is yet sufficient if the territorial alteration or the formation of a new state is demanded by the inhabitants and an overwhelming federal interest renders it imperative.

The will of the population is to be ascertained by voting. The federal government orders the taking of the vote upon the demand of one-third of the Reichstag electors resident in the district to be detached.

A decision in favour of a territorial alteration or of the formation of a new state to be effective has to be approved by three-fifths of the votes cast and at the least by a majority of those entitled to vote. Even if merely a part of a Prussian "district" or of a Bavarian "circle" or of a similar administrative area of another state is to be detached, the wishes of the whole of the population of the district in question have to be ascertained. If the part to be detached is not contiguous with the main district, it may be provided by a special law that the vote of the inhabitants of the part to be detached shall be sufficient.

The consent of the population having been obtained, the federal government lays before the Reichstag a law embodying the decision.

Any dispute as to proprietary rights which may arise between states in case of such union or separation is decided, at the instance of either party, by the State Court for the German Federation.

Article 19.

Disputes on constitutional questions arising within a state in which no court exists for their decision, as well as disputes, outside the domain of private law, between different states or between the Federation and a state are decided, at the instance of either party to the dispute, by the State Court for the German Federation, provided that no other federal court is competent to deal with it.

The President of the Federation executes the judgments of the State Court.

Section II.

The Reichstag.

ARTICLE 20.

The Reichstag is composed of the representatives of the German people.

The deputies are, each of them, representatives of the whole people. They are subject to their conscience alone and not bound by instructions.

ARTICLE 22.

The representatives are elected by the universal, equal, direct, and secret suffrage of all men and women over twenty years of age in accordance with the principle of proportional representation. Election day must be a Sunday or a public holiday.

All details will be regulated by the Federal Election Law.

ARTICLE 23.

The Reichstag is elected for four years. The general election must be held at the latest on the sixtieth day after that period has elapsed.

The Reichstag assembles for the first time not later than on the thirtieth day after the election.

ARTICLE 24.

The Reichstag assembles annually on the first Wednesday in November at the seat of the federal government. The President of the Reichstag must summon it earlier if either the President of the Federation or at least one-third of its members demand it.

The Reichstag decides when the session is to close and when it is to re-assemble.

ARTICLE 25.

The President of the Federation may dissolve the Reichstag, but only once for any one cause.

The general election is held not later than on the sixtieth day after dissolution.

ARTICLE 26.

The Reichstag elects its President, Vice-Presidents and Secretaries. It draws up its Standing Orders.

ARTICLE 27.

Between two sessions or between two elective periods the President and the Vice-Presidents of the last session continue to perform the duties of their respective offices.

ARTICLE 28.

The President exercises domestic authority and police powers in the Reichstag building. The administration of the house is in his charge; he regulates the receipts and expenditure of the house in conformity with the budgetary provisions and represents the Federation in all transactions and in all legal disputes that fall within the sphere of his administration.

ARTICLE 29.

The sittings of the Reichstag are public. Strangers may be excluded on the motion of fifty members, carried by a two-thirds' majority.

ARTICLE 30.

Accurate reports of the proceedings in public sittings of the Reichstag, of a Landtag, or of their committees are absolutely privileged.

ARTICLE 31.

A tribunal for disputed elections will be formed in connection with the Reichstag. It also decides whether a deputy has lost his membership.

The Tribunal for Disputed Elections consists of members of the Reichstag chosen for the electoral period and members of the Federal Administrative Court appointed by the President of the Federation on the nomination of the president of that court.

The decisions of the tribunal for disputed elections are given after a public trial before a bench composed of three members of the Reichstag and two judicial members.

Apart from the proceedings before the tribunal the necessary investigations are carried out by a Federal Commissioner appointed by the President of the Federation. In all other respects the tribunal will make its own rules of procedure.

ARTICLE 32.

For a resolution of the Reichstag a simple majority is required, except where another majority is prescribed by the constitution.

In the case of elections by the Reichstag the Standing Orders may admit exceptions.

The standing orders will determine what number of members form a quorum.

ARTICLE 33.

The Reichstag and its committees may require the presence of the Federal Chancellor and of every Federal Minister.

The Federal Chancellor, the Federal Ministers and Commissioners appointed by them have access to the sittings of the Reichstag and of its committees. The states are entitled to send plenipotentiaries to these sittings to explain the standpoint of their government in respect of the subject under deliberation.

At their request the government representatives must be heard during the debate, the representatives of the federal government without regard to the Order of the Day.

They are subject to the disciplinary powers of the President.

ARTICLE 34.

The Reichstag has the right, and upon the motion of one-fifth of its members the duty, to appoint Committees of Enquiry. These committees sit in public to take such evidence as they or the proposers deem necessary; but the public may be excluded by the committee passing a resolution to that effect by a two-thirds' majority. The Standing Orders regulate the procedure of the committee and determine the number of its members.

The courts and the administrative authorities are bound to collect evidence at the request of these committees; official documents are to be placed before them upon their demand.

The provisions of the Code of Criminal Procedure are applied, as far as possible, to the evidence taken by the committees or by the authorities at their request, but the secrecy of correspondence and of postal, telegraphic and telephonic communications remains inviolable.

ARTICLE 35.

The Reichstag appoints a Standing Committee for Foreign Affairs, which may meet even when the Reichstag is not in session, and after the electoral period has elapsed, or after a dissolution of the Reichstag until the newly elected Reichstag meets. The sittings of this committee are not public, unless the committee otherwise resolves by a two-thirds' majority.

Furthermore, the Reichstag appoints a Standing Committee for

the Protection of the Rights of the Representatives of the People as against the Federal Government to act when the Reichstag is not in session and after the electoral period has elapsed.

These Committees have the same rights as Committees of Enquiry.

ARTICLE 36.

No proceedings, legal or disciplinary, may be instituted at any time against any member of the Reichstag or of a Landtag for the way in which he has voted nor for any utterance made in the exercise of his parliamentary duties nor may he be otherwise called to account anywhere outside the House.

ARTICLE 37.

No criminal proceedings may be instituted against any member of the Reichstag or of a Landtag, nor may he be arrested, during the session, for any punishable act without the consent of the house of which he is a member, unless he has been apprehended at the time of doing the act or, at the latest, in the course of the following day.

The same consent is required for any other restraint of his personal freedom which interferes with the exercise of his parliamentary duties.

All criminal proceedings against a member of the Reichstag or of a Landtag and every arrest or other restraint of his personal freedom are suspended for the duration of the session upon the demand of the house of which he is a member.

ARTICLE 38.

Members of the Reichstag or of a Landtag are entitled to refuse evidence as regards persons who have confided to them, or to whom they have confided, any facts in their character as deputies, as well as regarding those facts themselves. In respect of seizure of documents they have the same privilege as persons who have a legal right to refuse evidence.

No search or seizure may be made within the precincts of the Reichstag without the consent of its president.

ARTICLE 39.

Officials and members of the defence force do not require leave for the exercise of their duties as members of the Reichstag or of a Landtag.

If they are candidates for a seat in one of these houses they are to be given such leave as is necessary in order to enable them to pursue their candidature.

ARTICLE 40.

Members of the Reichstag are to be entitled to travel free of charge on all German railways and to receive compensation on a scale to be defined by a federal law.

Section III.

The President of the Federation and the Federal Government.

ARTICLE 41.

The President of the Federation is elected by the whole German people.

Every German who has completed his thirty-fifth year is eligible.

Details will be laid down in a federal law.

ARTICLE 42.

When entering upon his office, the President of the Federation takes the following oath before the Reichstag,

> "I swear to devote my strength to the welfare of the German people, to further its interests, to guard it from harm, to observe the constitution and the laws of the Federation, to fulfil my duties conscientiously, and to do justice to all men."

It is permissible to add a formula by which to give the oath a religious sanction.

ARTICLE 43.

The President of the Federation remains in office for seven years. Re-election is permitted.

Before the expiration of that term the President of the Federation may be removed from office, upon the motion of the Reichstag, by a vote of the people. The resolution must be carried in the Reichstag by a two-thirds' majority. By such a resolution the President of the Federation is at once suspended from the further

exercise of his office. The refusal of the people to sanction his removal from office is equivalent to re-election and carries with it the dissolution of the Reichstag.

Criminal proceedings may not be instituted against the President of the Federation without the consent of the Reichstag.

ARTICLE 44.

The President of the Federation cannot at the same time be a member of the Reichstag.

ARTICLE 45.

The President of the Federation represents the Federation in its international relations. He concludes alliances and other treaties with foreign powers in the name of the Federation. He accredits and receives ambassadors.

Declaration of war and conclusion of peace are effected by federal law.

Alliances and such treaties with foreign states as refer to matters of federal legislation require the consent of the Reichstag.

ARTICLE 46.

The President of the Federation appoints and dismisses the federal officials and the officers of the defence force, in so far as the laws do not otherwise provide. He may delegate his powers of appointment and dismissal to other authorities.

ARTICLE 47.

The President of the Federation has supreme command over the whole of the defence force of the Federation.

ARTICLE 48.

If a state fails to perform the duties imposed upon it by the federal constitution or by federal law, the President of the Federation may enforce performance with the aid of the armed forces.

If public order and security are seriously disturbed or endangered within the Federation, the President of the Federation may take all necessary steps for their restoration, intervening, if need be, with the aid of the armed forces. For the said purpose he may suspend for the time being, either wholly or in part, the fundamental rights described in Articles 114, 115, 117, 118, 123, 124, and 153.

The President of the Federation has to inform the Reichstag without delay of any steps taken in virtue of the first and second

paragraphs of this article. The measures to be taken are to be withdrawn upon the demand of the Reichstag.

Where delay is dangerous a state government may take provisional measures of the kind described in paragraph 2 for its own territory. Such measures are to be withdrawn upon the demand of the President of the Federation or of the Reichstag.

All details will be regulated by a federal statute.

ARTICLE 49.

The President of the Federation exercises the right of pardon on behalf of the Federation.

Federal amnesties require a federal law.

ARTICLE 50.

All orders and decrees of the President of the Federation, including those relating to the defence force, in order to be valid, must be countersigned by the Federal Chancellor or by the competent Federal Minister. Such countersignature implies assumption of responsibility.

ARTICLE 51.

In case of disability of the President of the Federation the Federal Chancellor acts in the first instance as his substitute. If the disability is likely to be prolonged, a substitute will be appointed by a federal statute.

The same rule applies if a premature vacancy occurs in the presidential office up to the completion of a new election.

ARTICLE 52.

The Federal Government consists of the Federal Chancellor and the Federal Ministers.

ARTICLE 53.

The President of the Federation appoints and dismisses the Federal Chancellor and, on the latter's recommendation, the Federal Ministers.

ARTICLE 54.

The Federal Chancellor and the Federal Ministers require the confidence of the Reichstag for the exercise of their offices. Any one of them must resign if the Reichstag withdraws its confidence from him by an express resolution.

ARTICLE 55.

The Federal Chancellor presides over the Federal Government and directs its business according to Standing Orders to be drawn up by the Federal Government and to be approved by the President of the Federation.

ARTICLE 56.

The Federal Chancellor settles the political programme, for which he is responsible to the Reichstag. Within the main lines of this programme each Federal Minister administers independently the department entrusted to him, for which he is personally responsible to the Reichstag.

ARTICLE 57.

The Federal Ministers must submit to the Federal Government for deliberation and decision all draft bills, all matters for which the constitution or the law prescribes that course, as well as differences of opinion upon questions which concern the departments of several Federal Ministers.

ARTICLE 58.

The Federal Government decides by a majority of votes. In case of a tie the chairman has a casting vote.

ARTICLE 59.

The Reichstag may impeach the President of the Federation, the Federal Chancellor and the Federal Ministers before the State Court for the German Federation for a culpable violation of the constitution or of a federal law. The bill of impeachment must be signed by at least one hundred members of the Reichstag and must be carried by the majority prescribed for amendments of the constitution. The details will be regulated by the federal law concerning the State Court.

Section IV.
The Reichsrat.

ARTICLE 60.

A Reichsrat will be formed for the representation of the German states in federal legislation and administration.

ARTICLE 61.

(As amended by law of March 24th, 1921.)

In the Reichsrat each state has at least one vote. In the case of the larger states one vote will be assigned for every 700,000 inhabitants. A surplus of not less than 350,000 inhabitants is reckoned as 700,000. No single state may be represented by more than two-fifths of the total number of votes.

After joining the German Federation, Austria will be entitled to be represented in the Reichsrat by a number of votes proportional to her population. Meanwhile the Austrian representatives may take part in the deliberations, but may not vote.

The number of votes is settled afresh by the Reichsrat after each general census.

ARTICLE 62.

In the committees which the Reichsrat forms from among its members, no state has more than one vote.

ARTICLE 63.

The states are represented in the Reichsrat by members of their governments. One-half of the Prussian votes, however, is assigned to the Prussian provincial administrations, in accordance with a state law to be enacted.

The states may send as many representatives to the Reichsrat as they have votes.

ARTICLE 64.

The Federal Government must summon the Reichsrat upon the demand of one-third of its members.

ARTICLE 65.

A member of the Federal Government presides over the Reichsrat and its committees. The members of the Federal Government have the right and, if requested, the duty to take part in the deliberations of the Reichsrat and its committees. They are entitled to speak at any time during the debate.

ARTICLE 66.

The Federal Government as well as each member of the Reichsrat are entitled to lay proposals before the Reichsrat.

The Reichsrat regulates its procedure by Standing Orders.

The plenary sittings of the Reichsrat are public, but strangers

may be excluded during the discussion of certain subjects, in accordance with the Standing Orders.

A simple majority of votes is sufficient for a decision.

ARTICLE 67.

The Reichsrat is to be kept informed by the Federal Ministers about the course of federal affairs. Upon matters of importance the Federal Ministers shall consult the committees of the Reichsrat within whose sphere the subject-matter falls.

Section V.

Federal Legislation.

ARTICLE 68.

Bills may be introduced by the Federal Government or may originate in the midst of the Reichstag itself.

Federal laws are enacted by the Reichstag.

ARTICLE 69.

Before introducing a bill, the Federal Government must obtain the consent of the Reichsrat. If the Federal Government and the Reichsrat cannot agree, the former may introduce the bill all the same, but, in doing so, must explain the divergent views of the Reichsrat.

If the Reichsrat adopts a bill to which the Federal Government does not agree, the latter must introduce the bill, at the same time explaining its own point of view.

ARTICLE 70.

The President of the Federation must authenticate all laws constitutionally enacted and must promulgate them within one month in the Federal Law Gazette.

ARTICLE 71.

Unless they otherwise provide, federal laws come into force on the fourteenth day after the day in which the Federal Law Gazette is published in the federal capital.

ARTICLE 72.

The promulgation of a federal law is to be postponed for two months upon the demand of one-third of the members of the Reichstag. But the President of the Federation may promulgate it in spite of such demand if both the Reichstag and the Reichsrat declare it to be urgent.

ARTICLE 73.

A law passed by the Reichstag shall, before its promulgation, be submitted to the popular vote if the President of the Federation so decides within one month.

A law the promulgation of which has been postponed at the instance of one-third of the members of the Reichstag is to be submitted to the popular vote upon the demand of one-twentieth of those entitled to vote.

Again, there may be an appeal to the decision of the people if one-tenth of the voters petition that a draft-law be submitted to the popular vote. Such petition must be based on a complete draft-bill. The Federal Government must submit it to the Reichstag, at the same time explaining its attitude towards it. There will be no appeal to the decision of the people if the desired bill is passed unamended by the Reichstag.

The budget, laws dealing with taxation or scales of pay can be submitted to the popular vote only at the instance of the President of the Federation.

The mode of procedure in connection with the appeal to the people and the initiative by petition will be regulated by a federal statute.

ARTICLE 74.

The Reichsrat may protest against laws passed by the Reichstag.

The protest must be lodged with the Federal Government within two weeks after the final vote has been taken in the Reichstag, and must be supported with reasons within a further period of two weeks at the latest.

In case of such protest the law is referred back to the Reichstag for further consideration. If then the Reichstag and the Reichsrat cannot agree, the President of the Federation may, within three months, cause the matter in dispute to be submitted to the popular vote. If the President of the Federation does not exercise this right, the law will not come into force. But if the Reichstag has passed it by a two-thirds' majority as against the protest of the Reichsrat, the President must either promulgate the law within three months or order it to be submitted to the popular vote.

ARTICLE 75.

A resolution of the Reichstag can be invalidated by popular vote only if the majority of those entitled do actually vote.

ARTICLE 76.

The constitution can be amended by legislation. However, resolutions of the Reichstag in favour of an amendment of the constitution are effective only if two-thirds of the legal total of members are present and at least two-thirds of those present consent thereto. Resolutions of the Reichsrat in favour of an amendment of the constitution likewise require a two-thirds' majority of the votes actually cast. In order that a decision of the people in favour of an amendment of the constitution, initiated by petition, take effect, the assent of the majority of those entitled to vote is required.

If the Reichstag has decided upon an amendment of the constitution as against the protest of the Reichsrat, the President of the Federation may not promulgate that law if within two weeks the Reichsrat demands that it be submitted to the popular vote.

ARTICLE 77.

In so far as the laws do not otherwise provide, the Federal Government issues such general administrative ordinances as are required for the execution of federal laws. The assent of the Reichsrat is required in the case of those federal laws the execution of which is left to the authorities of the states.

Section VI.

Federal Administration.

ARTICLE 78.

The administration of the relations with foreign states is the business of the Federation alone.

In those matters which the state legislatures have power to regulate, the states may conclude treaties with foreign states, subject however to the consent of the Federation.

Treaties with foreign states by which the federal frontiers are altered are concluded by the Federation, the consent of the

affected state having been previously obtained. Alterations of frontiers may be affected in virtue of a federal law only unless it is a question of a mere ratification of frontiers in uninhabited districts.

In order to ensure the representation of such interests of individual states as result from their particular economic relations or local contiguity with foreign states, the Federation makes the necessary arrangements, and takes the required measures, in agreement with the states concerned.

ARTICLE 79.

The defence of the Federation is undertaken by the Federation itself. The organisation of the defence force of the German people will be uniformly regulated by a federal law, with due regard, however, to racial peculiarities.

ARTICLE 80.

Colonial affairs are exclusively the business of the Federation.

ARTICLE 81.

All German merchantmen form a uniform mercantile marine.

ARTICLE 82.

Germany forms a single area for customs and trade, surrounded by a common customs frontier.

On land the customs frontier coincides with the political frontiers. On the sea it is formed by the shore of the mainland and of the islands forming part of federal territory. For the course of the customs frontier on the sea and other expanses of water deviations may be fixed.

Territories of foreign states or parts of such territories may be included in the German customs area by treaties or conventions.

For special cause parts may be excluded from the customs area. The exclusion of free ports can be abolished only by a law passed in the forms prescribed for amendments of the constitution.

Parts excluded from the German customs area may join a foreign customs area by means of treaties or conventions.

All natural products, as well as manufactured commodities, in respect of which there is internal free trade within the Federation, may be imported, exported, or carried in transit, across the frontiers of states and communal boundaries. Exceptions are permissible only in virtue of a federal law.

ARTICLE 83.

Customs and excise are administered by federal authorities.

In the administration of federal taxes by federal authorities arrangements are to be made so as to permit the states to safeguard their special interests in the sphere of agriculture, trade, manufacture and industry.

ARTICLE 84.

(Obsolete.)

The Federation provides by law for—

(1) the organisation of the administration of taxes by the states, in so far as required for a uniform and equal execution of the federal finance laws;

(2) the organisation and powers of the authorities entrusted with the supervision of the execution of the federal finance laws;

(3) the settlement of accounts with the states;

(4) the reimbursement of the costs of administration incurred in the execution of the federal finance laws.

ARTICLE 85.

The whole of the federal revenue and expenditure must be estimated for each financial year and shown in the budget.

The budget is settled by law before the beginning of the financial year.

Supplies are granted, as a rule, for one year; in special cases they may be granted for a longer period. Furthermore, the budget may contain no provisions which extend beyond the financial year or do not deal with revenue or expenditure or their administration.

The Reichstag may not augment grants nor insert fresh items of expenditure in the budget without the consent of the Reichsrat.

Failing the consent of the Reichsrat, the provisions of Article 74 may bo resorted to.

ARTICLE 86.

In the following financial year the Federal Minister of Finances accounts both to the Reichsrat and the Reichstag for the application of the whole of the federal revenue, thereby relieving the Federal Government of their responsibility. The auditing of accounts is regulated by federal law.

ARTICLE 87.

Moneys may be raised upon credit for extraordinary needs only, and, as a rule, only for productive expenditure. A federal law alone can authorise such raising of moneys or the assumption, by the Federation, of liability by way of guarantee.

ARTICLE 88.

The postal and telegraphic services, together with the telephonic service, are solely the business of the Federation.

Postage stamps are uniform for the whole of the Federation.

The Federal Government, with the consent of the Reichsrat, issues ordinances which lay down the principles and scales of charges for the use of those means of communication. It may, with the consent of the Reichsrat, delegate these powers to the Federal Postmaster-General.

The Federal Government, with the consent of the Reichsrat, establishes an Advisory Council to co-operate, in a consultative capacity, in the administration of the postal, telegraphic and telephonic services.

The Federation alone concludes treaties with foreign states concerning communications.

ARTICLE 89.

It is the duty of the Federation to take over the ownership of all railways which serve for public traffic and to administer them as one single undertaking.

The rights of the states to acquire private railways are to be transferred to the Federation upon demand.

ARTICLE 90.

With the ownership of the railways the right of expropriation and the sovereign rights of the states in railway matters pass to the Federation. In case of dispute the State Court defines the extent of these rights.

ARTICLE 91.

The Federal Government, with the consent of the Reichsrat, issues the ordinances which regulate the construction, the management and the working of the railways. With the consent of the Reichsrat it may delegate these powers to the competent Federal Minister.

ARTICLE 92.

Though their budget and their accounts are shown in the general budget and the general accounts of the Federation, the railways are to be administered as an independent economic undertaking, which is to defray its own expenses, including interest and sinking-fund for the railway-debt, and is to accumulate a reserve-fund. The amount of the sinking-fund charges and that of the reserve-fund, as well as the application of the latter, are to be regulated by a special federal statute.

ARTICLE 93.

The Federal Government, with the consent of the Reichsrat, establishes Advisory Councils for the federal railways, who are to co-operate, in a consultative capacity, in matters relating to railway traffic and tariffs.

ARTICLE 94.

When once the Federation has taken over, in a certain district, the railways which serve for public traffic, new railways which are to serve for public traffic may be built in that district by the Federation only, or with its consent. If the construction of new federal railways or the alteration of existing ones touches the province of the state police, the federal railway administration must hear the state authorities before coming to a decision.

Where the Federation has not yet taken over the railway administration, it may, in virtue of a federal law, in spite of the opposition of the states through whose territories they are to run, without prejudice however to their sovereign rights, build, for its own account, such railways as appear necessary in the interest of public traffic or of home defence, or it may grant concessions for their construction to others, conferring upon them, if need be, the right of expropriation.

Every railway administration must allow other railways to be linked up with it at their expense.

ARTICLE 95.

Railways for public traffic which are not under federal administration, are subject to federal supervision.

Railways subject to federal supervision are to be planned and equipped on principles laid down by the Federation. They are to be maintained in safe condition and to be extended according

to traffic requirements. Passenger and goods traffic are to be served and organised according to requirements.

In the supervision of tariffs uniform and low rates are to be aimed at.

ARTICLE 96.

All railways, including those not serving for public traffic, have to comply with the demands of the Federation for the use of the railways for purposes of home defence.

ARTICLE 97.

It is the duty of the Federation to take over the ownership and administration of all waterways which serve for public traffic.

When once they have been taken over, waterways serving for general traffic can be constructed or extended by the Federation only, or with its consent.

In the administration, extension or new construction of waterways, the requirements of agriculture and the water-supply for economic purposes must be safeguarded, in agreement with the states. The furtherance of these interests must also be taken into consideration.

Every waterway administration must allow other inland waterways to be linked up with it at the expense of their promoters. The same obligation exists as regards the establishment of connections between inland waterways and railways.

With the waterways the right of expropriation and the control of tariffs, as well as the river and navigation police, pass to the Federation.

The tasks of the inter-state boards as regards the improvement of natural waterways in the course of the Rhine, the Weser and the Elbe and their respective tributaries pass to the Federation.

ARTICLE 98.

The Federal Government, with the consent of the Reichsrat, will make the necessary arrangements for the establishment of Advisory Councils for the federal waterways, who are to co-operate in all matters concerning their administration.

ARTICLE 99.

In connection with natural waterways tolls may be levied only for such works, installations and institutions as are intended for

the facilitation of traffic. In the case of state and communal institutions they may not exceed the cost of establishment and maintenance. For institutions which are not intended solely for the facilitation of traffic, but also for the furtherance of other objects, only a proportionate part of the cost of establishment and maintenance may be raised by tolls on navigation. By cost of establishment are meant the interest on, and the sinking-fund charges in respect of, the capital sum spent.

The provisions of the previous paragraph apply to tolls levied for artificial waterways and the institutions connected with them, as well as to port-charges.

In the sphere of inland navigation tolls may be based on the total cost of a single waterway, of a river-system, or of a network of waterways.

These provisions also apply to rafts on navigable waterways.

The Federation alone has power to impose other or higher tolls upon foreign ships and cargoes than upon German ships and cargoes.

In order to provide the necessary funds for the maintenance and extension of the German network of waterways, the Federation may by law require those interested in their navigation to contribute otherwise.

Article 100.

To defray the cost of maintenance and construction of inland waterways, a federal law may impose contributions upon those who profit by the construction of dams otherwise than by navigation, provided that several states participate in their construction or that the Federation bears the cost thereof.

Article 101.

It is the duty of the Federation to take over the ownership and administration of all marks for navigation, especially light-houses, light-ships, buoys, casks, and beacons. When once they have been taken over, marks for navigation may be erected or added to by the Federation only, or with its consent.

Section VII.
Administration of Justice.

ARTICLE 102.

Judges are independent and subject to the law only.

ARTICLE 103.

The ordinary jurisdiction is exercised by the Supreme Federal Court of Judicature and by the courts of the states.

ARTICLE 104.

Judges of the ordinary jurisdiction are appointed for life. Against their will they may be relieved of their office, permanently or provisionally, or transferred to another post, or retired, only in virtue of a judicial decision and on the grounds and in the forms prescribed by law. Age limits may be fixed by law, on attaining which judges are to retire.

Provisional removal from office by operation of the law is not thereby affected.

In case of changes in the organisation of the courts or of their jurisdictional areas the state administration of justice may order judges, against their will, to be transferred to other courts or to be relieved of office, but only with full pay.

These provisions do not apply to commercial judges, lay assessors, and jurymen.

ARTICLE 105.

Exceptional courts are forbidden. No one may be withdrawn from his lawful judge. The legal provisions as to military courts and courts-martial are not hereby affected. Military courts of honour are abolished.

ARTICLE 106.

Military jurisdiction is to be abolished except in times of war and on board men-of-war. Details will be regulated by a federal statute.

ARTICLE 107.

There must be administrative courts, in virtue of laws, both in the Federation and in the states for the protection of the individual against orders and decrees of the administrative authorities.

ARTICLE 108.

In accordance with a federal law a State Court for the German Federation will be established.

PART II.

FUNDAMENTAL RIGHTS AND DUTIES OF GERMANS.

Section I.

The Individual.

ARTICLE 109.

All Germans are equal before the law.

Men and women have in principle the same political rights and duties.

Privileges and disadvantages of birth or rank within the sphere of public law are to be abolished. Titles of nobility are considered to form part of the name only; they may no longer be conferred.

Titles may be conferred only when descriptive of an office or calling; academic degrees are not hereby affected.

Orders and decorations may not be conferred by the state.

No German may accept a title or an order from a foreign government.

ARTICLE 110.

Nationality in the Federation and in the states is acquired and lost in accordance with the provisions of a federal law. Every subject of a state is at the same time a subject of the Federation.

Every German has in every state the same rights and duties as the subjects of the state themselves.

ARTICLE 111.

All Germans are free to move from place to place everywhere within the Federation. Every one is entitled to stay and to settle in any part of the federal territory, there to acquire land and to follow any calling. Restrictions can be imposed by federal law only.

ARTICLE 112.

Every German is entitled to emigrate to foreign countries. Restrictions may be imposed on the right of emigration by federal law only.

All subjects of the Federation, both within and outside federal territory, have a claim to the protection of the Federation against foreign states.

No German may be extradited to a foreign government for trial or punishment.

ARTICLE 113.

Heteroglossal sections of the federal population are not to be interfered with, by either legislation or administration, in their free national development, least of all in the use of their native tongue in education, in home affairs and in the administration of justice.

ARTICLE 114.

Personal freedom is inviolable. No restraint or deprivation of personal liberty by the public power is admissible, unless authorised by law.

Persons in custody are to be informed, at the latest on the following day, by what authority and upon what grounds they were ordered to be deprived of their liberty, and they must at once be given an opportunity to raise objections against such deprivation.

ARTICLE 115.

The residence of every German is a sanctuary for him and inviolable. Exceptions are admitted in virtue of the laws only.

ARTICLE 116.

No one may be punished for an act unless such act was legally punishable at the time when it was committed.

ARTICLE 117.

The secrecy of correspondence, as well as the secrecy of postal, telegraphic and telephonic communications is inviolable. Exceptions may be admitted by federal law only.

ARTICLE 118.

Every German is entitled within the limits of the general law freely to express his opinions by word of mouth, writing, printing, pictorial representation, or otherwise. No condition of work or employment may curtail this right, and no one may put him to a disadvantage for having made use of this right.

There is no censorship, but the law may otherwise provide as regards cinematographic performances. Legislative measures are also permitted for the purpose of combating base and pornographic publications and for the protection of the young in public shows and representations.

Section II.
Social Life.

ARTICLE 119.

Marriage, as being the basis of family life and the fundamental condition for the preservation and increase of the nation, is under the special protection of the constitution. It rests upon the equality of rights of the two sexes.

The preservation of the purity and health and the social furtherance of the family is the task both of the state and of the local communities. Large families have a claim to compensatory advantages.

Motherhood has a claim upon the protection and care of the state.

ARTICLE 120.

The education of the offspring so as to ensure their physical, mental and social fitness is the supreme duty and at the same time the natural right of the parents, but the state has to watch over their activities in this direction.

ARTICLE 121.

By legislation illegitimate children are to be offered the same opportunities for their physical, mental and social development as legitimate children.

ARTICLE 122.

The young are to be protected against exploitation as well as against moral, intellectual or physical neglect. The state and the local communities are to make the necessary arrangements.

Compulsory protective measures may be imposed only in so far as authorised by law.

ARTICLE 123.

All Germans have the right without previous notification or special permission to assemble peaceably and unarmed.

Open-air meetings may be made notifiable by federal law and may be forbidden if they are a direct danger to public security.

ARTICLE 124.

All Germans have the right to form societies or associations for any object that does not run counter to the criminal law. This

right may not be curtailed by preventive measures. The same provisions apply to religious societies and bodies.

Every association is free to become incorporated in accordance with the provisions of the civil law. This right may not be refused on the ground that the society in question has a political, political and social, or religious object.

ARTICLE 125.

Freedom of elections and secret voting are guaranteed, the necessary details being provided by the election laws.

ARTICLE 126.

Every German has the right to complain in writing or to present petitions to the competent authority or to the representatives of the people. This right may be exercised either by individuals severally or by a number of persons jointly.

ARTICLE 127.

Local communities and their unions have the right of self-government within the limits of the laws.

ARTICLE 128.

All citizens without distinction are eligible for public offices according to the provisions of the law and their own qualifications and capacities.

All regulations discriminating against women officials are to be abolished.

The principles governing the status of officials are to be laid down by a federal law.

ARTICLE 129.

Officials are appointed for life unless otherwise provided by law. Pensions and provisions for surviving dependents are regulated by law. The well-established rights of officials are inviolable. Officials are at liberty to pursue claims of a financial character by ordinary legal proceedings.

Officials may be provisionally relieved of their office, temporarily or permanently retired, or transferred to another office carrying lower pay, only under the conditions and in the forms provided by law.

Opportunities must be provided for lodging complaints, or appeals with the view to a reopening of the trial, against every disciplinary award of a penal character. No fact prejudicial to

an official may be entered on his personal record unless he has been given an opportunity to offer explanations. Every official is to be permitted to inspect his personal record.

The inviolability of their well-established rights and the liberty to pursue claims of a financial character by ordinary legal proceedings is especially guaranteed to professional soldiers too. Otherwise their status will be regulated by a federal law.

ARTICLE 130.

Officials are servants of the community, and not of a party.

Freedom of political opinion and freedom of combination is guaranteed to all officials.

Officials are to be given special representation; the necessary details will be regulated by a federal law.

ARTICLE 131.

If an official in the exercise of the public powers vested in him violate an official duty incumbent upon him as against a third party, the state or the corporation in whose service the official is employed, is on principle responsible. The claim to an indemnity as against the official is reserved. The jurisdiction of the regular courts may not be excluded.

The more detailed regulation of this matter falls within the province of the competent legislatures.

ARTICLE 132.

Every German is obliged to accept honorary public office in accordance with the provisions of the laws.

ARTICLE 133.

All citizens are obliged in accordance with the provisions of the laws to render personal services for the state and the local community.

The duty to render military service is regulated by the federal defence law. The latter will also define the extent to which in the case of members of the defence force some of the fundamental rights will have to be curtailed in order that they may duly perform their task and that discipline may be maintained.

ARTICLE 134.

All citizens without distinction have to contribute to all public burdens in proportion to their means in accordance with the provisions of the laws.

Section III.
Religion and Religious Bodies.

ARTICLE 135.

All inhabitants of the Federation enjoy full liberty of faith and of conscience. The undisturbed practice of worship is guaranteed by the constitution and is under the protection of the state. This is without prejudice to the general laws of the state.

ARTICLE 136.

Civil and political rights and duties are neither dependent upon nor limited by the practice of religious freedom.

The enjoyment of civil and political rights as well as the eligibility for public office are independent of religious creed.

Nobody is obliged to disclose his religious convictions. The authorities have no right to inquire into the membership of a religious body except in so far as rights and duties depend on it, or unless it is required for a statistical investigation ordered by law.

Nobody may be compelled to perform a religious act or ceremony or to take part in religious practices or to take an oath in a religious form.

ARTICLE 137.

There is no State Church.

Freedom of association is guaranteed to religious bodies. The union of religious bodies within federal territory is subject to no restrictions.

Every religious body orders and administers its affairs independently within the limits of the law applicable to all. It confers its offices without the co-operation of the state or of the civil community.

Religious bodies are incorporated according to the general provisions of the civil law.

Religious bodies that have hitherto been public corporations continue as such. On their proposition other religious bodies are to be granted the same privilege if by their constitution and membership they offer a guarantee of permanence. If several such religious bodies, being public corporations, form a union, that union is likewise a public corporation.

Such religious bodies as are public corporations are entitled, subject to the provisions of the state laws, to levy taxes on the basis of the civil tax-rolls.

Associations formed for the cultivation in common of a world philosophy are placed on the same footing as religious bodies.

It is for the state legislatures to enact such provisions, if any, as may be necessary to give effect to these principles.

ARTICLE 138.

State contributions to religious bodies, in so far as they rest on a statutory, contractual, or other special title, are to be commuted by state legislation. The principles which are to govern commutation will be laid down by the Federation.

ARTICLE 139.

Sundays and public holidays continue to enjoy the protection of the law as days of rest from labour and of spiritual edification.

ARTICLE 140.

Members of the defence force are to be given the necessary leave for the performance of their religious duties.

ARTICLE 141.

In so far as there is a demand for worship and care of souls in the army, in hospitals, penal establishments or other public institutions, the religious bodies are to be admitted to perform religious acts, every form of compulsion being, however, avoided.

Section IV.
Education and Schools.

ARTICLE 142.

Art, science, and the teaching of either are free. The state accords them protection and takes part in their furtherance.

ARTICLE 143.

The education of the young is to be provided for by means of public institutions. In their organisation the Federation, the states and the local communities co-operate.

The training of teachers is to be regulated on uniform lines for the whole of the Federation in accordance with the general principles of higher education.

Teachers in public schools have the rights and duties of government officials.

ARTICLE 144.

Tho whole of the educational system is under the supervision of the state; the latter can assign a share in this task to the local communities. The supervision is to be carried out by whole time inspectors who have had a proper professional training.

ARTICLE 145.

School attendance is compulsory—in principle at a public elementary school for eight years and thereafter at a continuation school up to the completion of the eighteenth year. Instruction and the accessories thereto are gratuitous in elementary and continuation schools.

ARTICLE 146.

The system of public education is to be developed as an organic whole. A first elementary school common to all is to serve as the foundation of secondary and higher education. The determining factor in this organisation is the variety of occupations, whilst for the admission of a child to a certain type of school its own gifts and inclinations, and not the economic and social position nor the religion of its parents, are decisive.

On the proposition of those responsible for the education of the young, however, elementary schools according with their religious faith or their world philosophy are to be established, provided that a well-ordered scheme of education, more especially within the meaning of the first paragraph of this article, is not prejudiced thereby. As far as possible, the wishes of those responsible for the education of the young are to be taken into consideration. All details relating to the subject will be regulated by stato legislation in accordance with the general principles to be laid down in a federal statute.

In order to enable children of people of smaller means to attend secondary and higher schools, public moneys are to be provided by the Federation, the states and the local authorities, especially, for educational grants to be made to parents of children who are considered suitable for training in secondary and higher schools, till their education is completed.

ARTICLE 147.

Private schools which are to serve as substitutes for public schools require a state licence and are subject to the state laws. Such licence is to be granted if such private schools are not inferior to public schools either in their educational aims and organisation or in the scientific training of their teaching staffs, provided that a separation of pupils according to the financial position of the parents is not furthered thereby. The licence must be refused if the legal rights and economic position of the teaching staff are not sufficiently secured.

Private elementary schools are to be licensed only if in a local community there is no public elementary school according with the religious faith or the world philosophy of a minority of those responsible for the education of the young, whose wishes, according to Art. 146, par. 2, are to be taken into consideration, or where the administrative educational authorities recognise a special pedagogic interest.

Private preparatory schools are to be abolished.

To private schools which do not serve as substitutes for public schools the laws hitherto in force remain applicable.

ARTICLE 148.

In every school the educational aims must be moral training, public spirit, personal and vocational fitness, and, above all, the cultivation of German national character and of the spirit of international reconciliation.

In public school teaching care is to be taken not to wound the susceptibilities of those holding different opinions.

Politics and civics and technical education are subjects of instruction in the schools. When leaving school, each pupil has handed to him a copy of the constitution.

Popular education, including university extension teaching, is to be furthered by the Federation, the states and the local communities.

ARTICLE 149.

Religious instruction is a regular subject in schools other than purely secular schools. School legislation will regulate the details relating to it. Religious instruction is given in accordance with the religious doctrines of the various denominations, without prejudice to the right of supervision of the state.

It lies entirely in the discretion of teachers whether or not to give religious instruction and to perform religious ceremonies, whilst those responsible for the religious education of a child are free to decide whether it is to attend classes of religious instruction and to take part in religious ceremonies and acts.

The theological faculties at the Universities are maintained.

ARTICLE 150.

Artistic, historical, and natural monuments, as well as landscapes, enjoy the protection and care of the state.

It is the task of the Federation to prevent the exportation to foreign countries of German art treasures.

Section V.
Economic Life.

ARTICLE 151.

The organisation of economic life must accord with the principles of justice and aim at securing for all conditions of existence worthy of human beings. Within these limits the individual is to be secured the enjoyment of economic freedom.

Legal compulsion is admissible only as far as necessary for the realisation of threatened rights or to serve overriding claims of the common weal.

Freedom of trade and industry is guaranteed within the limits prescribed by federal laws.

ARTICLE 152.

In economic intercourse freedom of contract is recognised within the limits of the laws.

Usury is forbidden. Transactions which are against public morals are void.

ARTICLE 153.

Property is guaranteed by the constitution. The content and limits of the right of property are defined by the laws.

Expropriation is admissible only in the public interest and so

far as authorised by law. It is accompanied by adequate compensation unless a federal law otherwise determines. In disputes about the amount of compensation the jurisdiction of the ordinary courts may be invoked unless a federal law otherwise determines. Expropriations by the Federation as against states, local communities and associations serving public interests is admissible only if accompanied by compensation.

Property entails responsibilities. It should be put to such uses as to promote at the same time the common good.

Article 154.

The right of inheritance is guaranteed within the limits of the civil law.

The share which the state takes in the estate of a deceased person is fixed by laws.

Article 155.

The distribution and the use of land are under state supervision with a view to the prevention of abuses and in order to secure for every German a healthy dwelling and for all German families, especially large ones, according to their needs suitable homesteads and small holdings. In the law to be enacted concerning homesteads the claims of those who have taken part in the late war will receive special consideration.

Land may be expropriated, if required for houses, for settlements, for bringing it under cultivation, or for the encouragement of agriculture. Entails are to be broken off.

The cultivation and utilisation of the soil is a duty which the landowner owes to the community. The unearned increment in the value of land is to be utilised for the benefit of the community.

All subsoil resources and all natural sources of power, as far as capable of being put to economic uses, are under the supervision of the state. Private royalties are, by law, to be transferred to the state.

Article 156.

The Federation may by law—without prejudice to claims to compensation and with due observance of the rules governing expropriations—convert into social property such private economic undertakings as are suitable for socialisation. It may assign to itself, to the states or to the local communities a share in the

management of economic undertakings or of their combinations, or otherwise secure for itself a decisive influence therein.

Furthermore, in case of urgent need the Federation may provide for the compulsory formation of self-governing syndicates out of economic undertakings and their combinations with a view to their management on social lines—the motive being to secure the co-operation of all productive sections of the community, to secure the participation of both employers and employed in the management, and to regulate on principles of social economy the production, manufacture, distribution, uses and prices, as well as the import and export, of economic commodities.

Upon their demand co-operative industrial and trading societies and their unions are to be incorporated into the socialised economic system, due regard being had to their constitution and to their peculiar character.

ARTICLE 157.

Labour is under the special protection of the Federation.
The Federation will draw up a uniform labour code.

ARTICLE 158.

Intellectual work, the rights of authors, inventors and artists enjoy the protection and care of the Federation.

For the creations of German science, art and technique recognition and protection is to be secured in foreign countries by means of international conventions.

ARTICLE 159.

Freedom to combine for the protection and betterment of their conditions of labour and of their economic position in general is guaranteed to all and in all occupations. All agreements and measures which tend to restrict or abrogate that freedom are contrary to law.

ARTICLE 160.

Any one in the position of an employee or workman has the right to such leave as is necessary to enable him to exercise his political rights and, in so far as the business in which he is employed is not seriously prejudiced thereby, to fill such honorary public offices as may be conferred upon him. The law will

provide to what extent he continues entitled to his pay in these circumstances.

ARTICLE 161.

The Federation will establish a comprehensive scheme of insurance for the maintenance of health and fitness for work, for the protection of motherhood, and as a provision against the economic consequences of old age, infirmity and the vicissitudes of life. In its administration a prominent share will be given to the persons insured.

ARTICLE 162.

The Federation will advocate such an international regulation of the status of workmen as tends to secure to the labouring classes everywhere a general minimum of social rights.

ARTICLE 163.

Every German is under a moral obligation, without prejudice to his personal liberty, to exercise his mental and physical powers in such a way as the welfare of the community requires.

Every German shall be given a chance to earn a living by economic labour. In so far as no suitable work can be found for him, provision is made for his support. All details will be regulated by special federal laws.

ARTICLE 164.

The interests of the independent middle class engaged in agriculture, industry and trade are to be furthered both in legislation and in administration; it must be protected against excessive burdens and against the risk of absorption.

ARTICLE 165.

Workmen and employees are called upon to co-operate, on an equal footing, with employers in the regulation of wages and of the conditions of labour, as well as in the general development of the productive forces. The organisations of the two groups of interests and the agreements entered into by them are recognised.

Statutory bodies representative of workmen and employees are to be created for the protection of their social and economic

interests, viz., Works' Councils, District Workmen's Councils organised so as to correspond with industrial areas, and a Federal Workmen's Council.

District Workmen's Councils and the Federal Workmen's Council join with representatives of employers and of other interested sections of the community to form District Economic Councils and a Federal Economic Council for the accomplishment of the economic tasks in general and to collaborate in the execution of the socialisation laws in particular. The District Economic Councils and the Federal Economic Council are to be so constituted that all important occupational groups are represented thereon in accordance with their respective economic and social importance.

Bills of fundamental importance in relation to matters of social and economic policy, before being introduced in the Reichstag, shall be submitted by the Federal Government to the Federal Economic Council for an expression of its opinion. The Federal Economic Council itself has the right to initiate such bills. If the Federal Government does not agree with any such bill it is nevertheless bound to introduce it in the Reichstag, with an explanation of its own standpoint. The Federal Economic Council may delegate one of its members to appear before the Reichstag in support of the bill.

Workmen's and Economic Councils may be entrusted with powers of control and of administration within the spheres of activities assigned to them respectively.

The Federation alone has power to regulate the composition and the tasks of the Workmen's and Economic Councils respectively, as well as their relations to other self-governing social bodies.

PROVISIONAL DISPOSITIONS AND CONCLUSIONS.

Article 166.

Until the establishment of the Federal Administrative Court its place in the formation of the Tribunal for Disputed Elections is taken by the Supreme Federal Court of Judicature.

(The following six articles are obsolete, viz.)

ARTICLE 167.

(Temporary provision on territorial changes within the Federation.)

ARTICLE 168.

(Temporary provision on the Prussian votes in the Reichsrat.)

ARTICLE 169.

(Temporary provision on the administration of customs and excise.)

ARTICLE 170.

(Temporary provision on the postal administrations of Bavaria and Württemberg.)

ARTICLE 171.

(Temporary provision on railways, waterways, marks for navigation.)

ARTICLE 172.

(Provisional State Court for the Federation.)

ARTICLE 173.

Until a federal law has been enacted in accordance with Article 138, the present state contributions to religious bodies, in so far as they rest on a statutory, contractual, or other special title, will continue to be paid.

ARTICLE 174.

Until the federal law provided for in Article 146, par. 2, has been enacted, the legal status quo is to be maintained. The law is to pay special attention to those parts of the Federation in which non-denominational schools have been legally established.

ARTICLE 175.

The provisions of Article 109 do not apply to orders and decorations to be conferred for merits during the years of war 1914—1919.

ARTICLE 176.

All public officials and all members of the defence force must take an oath loyally to uphold this constitution. All details will be regulated by a presidential ordinance.

ARTICLE 177.

Whenever the use of a religious formula in taking an oath is prescribed in existing laws, the religious formula may be omitted and replaced by the words "I swear." The legal character of the oath and the legal consequences of taking an oath are not thereby affected.

ARTICLE 178.

(As amended by law of August 6th, 1920.)

The Constitution of the German Empire of April 16th, 1871, and the law on the provisional exercise of federal powers of February 10th, 1919, are repealed.

All other federal laws and ordinances remain in force, as far as they are consistent with this constitution. The provisions of the Treaty of Peace signed at Versailles on June 28th, 1919, are not affected by the constitution. In view of the negotiations as the result of which the isle of Heligoland has been acquired, the qualification for communal elections in that island may be regulated, in favour of its native population, on principles different from those laid down in Article 17, par. 2.

Rules and regulations issued by the authorities in virtue of existing laws and valid thereunder, remain valid until they are repealed either by fresh rules and regulations or by legislation.

ARTICLE 179.

In so far as in laws and ordinances provisions and institutions abolished by this constitution are referred to, they are replaced by the corresponding provisions and institutions of this present constitution. In particular, the National Assembly is replaced by the Reichstag, the Committee of States by the Reichsrat, the President of the Federation elected in virtue of the law on the provisional organisation of federal powers by the President of the Federation elected in virtue of this constitution.

The power of issuing ordinances hitherto exercised by the Committee of States in virtue of existing legal provisions passes to the Federal Government; the latter requires the consent of the Reichsrat in those cases in which this constitution prescribes it.

Article 180.

(Until the first Reichstag assembles the National Assembly acts as Reichstag. Obsolete.) Until the first President of the Federation enters upon his office, the duties of that office are performed by the President of the Federation elected in virtue of the law on the provisional organisation of federal powers.

Article 181.

The German people, through its National Assembly, has framed and enacted this present constitution. It comes into force on the day of its promulgation.

Date Due

FEB 17		MAR 1 6 1988	
5.30		NOV 1 7 1991	
FEB 15 1972		OCT 2 2 1997	
MAR 15 1972		OCT 3 1 1997	
MAR 28 1972			
APR 18 1972			